TAIWAN AND THE RESOLUTION OF FISHERIES CONFLICTS IN THE SOUTH CHINA SEA

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A THESIS SUBMITTED TO THE UNIVERSITY OF BRISTOL
IN ACCORDANCE WITH THE REQUIREMENTS OF THE DEGREE OF Ph.D.
IN THE FACULTY OF LAW, DEPARTMENT OF LAW

NOVEMBER 1996

ABSTRACT

The Republic of China in Taiwan is a maritime nation situated in Southeast Asia, with well-developed fishing technology, and which has become one of the most important fishing nations in the world. However, Taiwan cannot negotiate with other states on fishery issues because of political difficulties associated with its international status. Nevertheless, most states know Taiwan is too important to be ignored. These circumstances only delay the resolution of disputes occurring between Taiwan and other states. This research focuses on the resolution of maritime disputes of the South China Sea in which Taiwan is one of the parties concerned.

This research is organised into four parts. Part One has two chapters. Chapter 1 defines the aims and scope of the research. Chapter 2 analyses the recent development of international law of the sea. It also discusses restrictions on freedom of fishing on the high seas, namely the issues of driftnet fishing and straddling stocks and highly migratory species.

Part Two considers the issue of disputes in the South China Sea. Chapter 3 provides a historical introduction and legal discussion of the international status of Taiwan. Chapter 4 illustrates Taiwan's and its neighbours' maritime claims and the overlapping maritime jurisdiction in the South China Sea. Following on this, Chapter 5 reviews fisheries problems in the South China Sea. Part Two suggests that a non-boundary-based resolution, provisional arrangements and co-operations, could be presented as a feasible solution.

Part Three looks at the impacts of non-recognition on Taiwan, which are statelessness, the inability to participate in international organisations, and the inability to conclude agreements with other states. Part Three concludes that Taiwan is capable of negotiating with other states, even if they do not recognise Taiwan as a state.

The author concludes, in Part Four, that without determining the ownership or jurisdiction over the islands and waters in the South China Sea at present stage, the claimant states can derive the most beneficial use of the South China Sea by co-operating in the management of fishery resources, because fishery resources management is a crucial starting point towards co-operation. A well-working case, the Anglo-Argentine fisheries regime, is introduced to demonstrate this conclusion. In addition, fishery co-operation can be a confidence building method. Its experience can offer a beneficial effect in other fields of co-operation. The author further suggests that all the relevant states, including Taiwan, should be included in the co-operation system, not only because it has the capabilities and will to join in the co-operation, but also because broad inclusion is one of the basic elements of achieving a successful co-operative mechanism.

DECLARATION

I certify that this thesis is my own work and that it has not been previously submitted for any other university degree. The views expressed in this thesis are wholly my own and not of the University.

Signed: Kuan-Hsiung Wang

Date: 29 March 1997

ACKNOWLEDGEMENTS

I am greatly indebted to my supervisor, Dr. Malcolm Evans, for his interest in my work, advice, and constant encouragement and support. From his patient guidance, I have experienced the abundance of the law of the sea. My thanks are also due to Mr. Neal Q. Stovicek for his help in correcting the English usage in my work.

I also want to express my thanks to Dr. K. C. Fu and Dr. W. S. Chuang of National Taiwan University for their inviting me to collaborate in their government-supported research project studying the feasibility of co-operation between Taiwan and the PRC. From this project, I was able to touch upon practical considerations in the process of policy making.

As this is a library-based research, I would like to express my appreciation to the staff of the following institutions for their kind assistance: Wills Library, University of Bristol; Institute of Advanced Legal Studies; London School of Economics; Institute of Southeast Asian Studies, Singapore; Arts & Social Studies Library, University of Wales, Cardiff; Boedlein Library, University of Oxford; Taipei Representative Office, London; and the Embassy of the PRC, London; Ministry of Foreign Affairs of the Republic of China; Council of Agriculture of the Republic of China; Overseas Fisheries Development Council of the Republic of China; Fishery Bureau, Department of Agriculture and Forestry, Taiwan Provincial Government; Office of the Assistant Legal Advisor for Treaty Affairs, Department of State, United States.

I also want to express my gratitude to the Committee of Vice-Chancellors and Principals of the Universities and Colleges in the United Kingdom (CVCP) for granting me an Overseas Research Students Awards from October 1991 to June 1993.

Last but not least, I am indebted to my family: to my parents whose support and love motivate me to carry through; and to my wife for providing me with invaluable understanding and encouragement throughout my work.

Kuan-Hsiung Wang

LIST OF ABBREVIATIONS

A.C.	*Appeal Cases*
AJIL	*American Journal of International Law*
All E. R.	*All England Law Reports*
Annals AAPSS	*The Annals of the American Academy of Political and Social Science*
ARCOA	*Annual Report of Council of Agriculture,* Executive Yuan, ROC
AS	*Asian Survey*
ASIL Proc.	*Proceedings of the American Society of International Law*
Boston College ICLR	*Boston College International and Comparative Law Review*
BYIL	*British Yearbook of International Law*
Case W. Res. J. Int'l L.	*Case Western Reserve Journal of International Law*
China Q.	*The China Quarterly*
Cmd., Cmnd.	Papers Presented to Parliament by Command of His (Her) Majesty: Cmd. 1-9889 (1919-1956) Cmnd. 1- (1956-)
COA	Council of Agriculture, Executive Yuan, ROC
CYILA	*Chinese Yearbook of International Law and Affairs*
E.C.R.	*European Court Reports*
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
EJIL	*European Journal of International Law*
E.R.	English Reports Reprint, 1220-1865
EU	European Union
FAO	United Nations, Food and Agriculture Organisation
FCJ	*The Free China Journal*
FEER	*Far Eastern Economic Review*
FFA	Forum Fisheries Agency
FRJ	*Foreign Relations Journal*
GAOR	United Nations, *General Assembly Official Records*
GATT	General Agreement on Tariffs and Trade
GAOR	United Nations, *General Assembly Official Records*
Hague Recueil	*Recueil des cours, Académie de droit international de la Hague*
HC Debs.	House of Commons Debates
HL Debs.	House of Lords Debates
IAS	*Issues and Studies*

ICJ	International Court of Justice
I.C.J. Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLARM	International Centre for Living Aquatic Resources Management
ICLQ	*International and Comparative Law Quarterly*
IISS	International Institute for Strategic Studies
IJECL	*International Journal of Estuarine and Coastal Law*
IJMCL	*International Journal of Marine and Coastal Law*
ILC Yearbook	*International Law Commission Yearbook*
ILM	*International Legal Materials*
ILR	*International Law Reports*, Edited by Lauterpacht, C. B. E. and Greenwood, C. J.
Int'l Trade Rept.	*International Trade Reporter*
INPFC	International North Pacific Fisheries Commission
IPFC	Indo-Pacific Fishery Commission
IQ	*The Indonesian Quarterly*
IS	*International Security*
J. Int'l Affairs	*Journal of International Affairs*
JMLC	*Journal of Maritime Law and Commerce*
JSS	*The Journal of Strategic Studies*
JWT	*Journal of World Trade*
Keesing's	*Keesing's Contemporary Archives (1931-1983); Keesing's Record of World Events (1984-)*
LNTS	*League of Nations Treaty Series*
LOSC	1982 United Nations Convention on the Law of the Sea
LOS Bulletin	*Law of the Sea Bulletin*
Louisiana LR	*Louisiana Law Review*
Mar. Pol.	*Marine Policy*
ML	*Military Law*
Mod. L. Rev.	*Modern Law Review*
MSY	Maximum Sustainable Yield
mt	metric ton(s)
NDLR	*Notre Dame Law Review*
nm	nautical mile(s)
ODIL	*Ocean Development and International Law*
OECD	Organisation for Economic Co-operation and Development
OY	*Ocean Yearbook*
PRC	People's Republic of China
P. Rev.	*The Pacific Review*
Pub. L.	*Public Law*
PCIJ	Publications of the Permanent Court of International Justice

Q.B.	*Queen's Bench Reports*
RIAA	United Nations, *Reports of International Arbitral Awards*
ROC	Republic of China
SDLR	*San Diego Law Review*
SCOR	United Nations, *Security Council Official Records*
SCSP	South China Sea Program
Texas ILJ	*Texas International Law Journal*
UBCLR	*University of British Columbia Law Review*
UKMIL	United Kingdom Materials on International Law, in British Yearbook of International Law
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS I	First United Nations Conference on the Law of the Sea, 1958
UNCLOS II	Second United Nations Conference on the Law of the Sea, 1960
UNCLOS III	Third United Nations Conference on the Law of the Sea, 1973-1982
UN Doc.	United Nations Document
UNTS	*United Nations Treaty Series*
U.S.C.	*United States Code*
VUWLR	*Victoria University of Wellington Law Review*
YILC	*Yearbook of International Law Commission*

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PART I.

INTRODUCTION

CHAPTER ONE

AIMS AND SCOPE OF THIS RESEARCH

The South China Sea is a semi-enclosed sea by its geographic structure. The littoral states should co-operate to create an environment so that the regional stability and development can be maintained. This is not the current state of affairs, however. Different political systems, different legal systems, different maritime claims, and distrust between the littoral states weave a situation of disputes. The aim of this research is twofold: firstly, the author would like to offer a resolution to the disputes in the South China Sea with a special reference to the idea of fishery co-operation. Secondly, as one of the five littoral states of the South China Sea and one of the important fishery nations in the region as well as in the world, Taiwan should play an integral role in resolving the disputes. Linked by the South China Sea, all the littoral states are bound together by political, legal, jurisdictional, and economic considerations. The author holds that fishery co-operation can help resolve the disputes of the South China Sea and that all littoral states should be included.

In order to clarify and develop these aims, the following questions will be discussed in the following chapters:

- What is the latest development in international law of the fisheries, especially in the field of high seas fishery?
- What is the status of Taiwan in the international law prospects?
- What is the impact of non-recognition on Taiwan?
- What is the motivation that causes disputes in the South China Sea?
- How can the concept of co-operation apply to the South China Sea?

The following approach is used to achieve the aims of this research and respond to the above questions. First of all, in Part One, Chapter 2, a study on the international law of fisheries is discussed. This is to provide a background to the latest developments in the international law of the sea to best understand fisheries in the territorial sea, in the Exclusive Economic Zone (EEZ), and on the high seas. Two latest developments on restrictions to the freedom of fishing on the high seas, driftnet fishing and the issue of straddling and highly migratory fish stocks are also discussed.

Secondly, Part Two discusses Taiwan's international status and the disputes in the South China Sea. This part can be divided into three chapters: Chapter 3 provides a historical introduction and legal discussion of the international status of Taiwan. Due to political considerations, Taiwan is not recognised by most of the states. Chapter 4 analyzes the relevant development of maritime claims in the South China Sea, including individual national declaration of maritime claims related to the South China Sea and overlapping claims in the region. Chapter 5 exposes the fisheries problems in the region and the idea of fishery co-operation within a legal framework. The author

discusses several other possible co-operative efforts including military co-operation and joint development of hydrocarbon resources.

Part Three discusses the impacts incurred by Taiwan since it is not recognised as a sovereign state by a majority of sovereign states and regional or international organisations. Taiwan is treated as stateless, is unable to participate in international organisations, and is unable to conclude bilateral or multilateral agreements. Applying the relevant case studies, the author demonstrates that Taiwan faces the above-mentioned three major obstacles because of its lack of an international legal status, but in reality Taiwan is not necessarily to be hindered to exercise its rights as a state.

Part Four concludes by comparing the Falkland Islands/Islas Malvinas fishery co-operation model to suggest that fishery co-operation in the South China Sea is feasible and would lead to a resolution of the disputes among the South China Sea's littoral states.

The scope of this research is limited to two main bodies: Taiwan and the littoral states of the South China Sea. 'Taiwan' refers to the Republic of China in Taiwan that was established in 1911 and its capital is Taipei. Another key littoral state is the People's Republic of China (or the PRC) that was established in 1949 with its capital in Beijing. As to the term 'China', it denotes both the PRC and the ROC according to the context. Other littoral states are Vietnam, Kampuchea, Thailand, Malaysia, Indonesia, Brunei, and the Philippines. But, given that disputes in the South China Sea centre on

the Spratly Islands, this research is limited to those that have juridical disputes over the Spratly Islands, namely, Taiwan, the PRC, Vietnam, Malaysia, and the Philippines.

CHAPTER TWO

INTERNATIONAL LAW OF FISHERIES

1. INTRODUCTION

The concept of freedom of the sea was advocated by a Dutch lawyer, Hugo Grotius. Grotius contended, in his treatise *Mare Liberum*, that the sea cannot be state property, because it could not be taken into possession through occupation, and that consequently the sea was by nature free from the sovereignty of any state.[1] This started the argument on the sovereignty over the seas.[2] Two centuries later, the principle of freedom of the open sea was recognised in theory and practice in the 19th century.[3]

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1 Grotius expressed this idea in his book, *De Jure Praedae*, although this book was published anonymously in 1608. *Mare Liberum* was the twelfth chapter of *De jure praedae.* See Anand, *Origin and Development of the Law of the Sea* (1983) pp. 77-89; Johnston, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* (1987) p. 165-166; O'Connell, *The International Law of the Sea*, Vol. I (1982) p. 9, 52n; Jennings and Watts, eds., *Oppenheim's International Law*, Vol. 1, Parts 2 to 4, 9th Edition (1992) p. 721, § 278.

2 The most important work defending maritime sovereignty was Seldon's *Mare Clausum.* Seldon wrote this book at the behest of the British Crown. He tried to prove that the kings of England had perpetually exercised exclusive jurisdiction in the surrounding seas as part of their territory and preserved the right to prohibit fishing and even navigation by foreigners in these waters. See Anand, *ibid.*, pp. 105-107; Jennings and Watts, *ibid.*, p. 721, § 278.

3 During this period of time, freedom of the seas played a prevalent role, such as Bynkershoek's *De Dominio Maris*. See Anand, *ibid.*, pp. 232-233; Jennings and Watts, *ibid.*, p. 722. § 279.

This principle was discussed in the 1958 UNCLOS I.[4] Moreover, the 1958 Geneva Convention on the High Seas, Article 2 provides

> Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia,* both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.

In the 1982 UN Convention on the Law of the Sea (hereinafter cited as LOSC), two more freedoms were added: freedom to construct artificial islands and other installations permitted under international law and freedom of scientific research.[5] It is worth noting, however, that the freedoms, whether those expressly stated in the 1958 Convention on the High Seas or in the 1982 LOSC, are enjoyed based on the qualification that they 'shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.'[6] This means that in the exercise of any of the freedoms, *due regard* must be had to the enjoyment by other states not only of that particular freedom, but of others of the freedoms.[7]

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4 UNCLOS I, *Official Records*, Vol. 4 (1958), pp. 113, 124. The International Law Commission discussed this matter before the UNCLOS I, however it did not include any provision in its final draft in 1956. See *ILC Yearbook* (1956) Vol. 1, p. 29, *et seq*.

5 LOSC, Article 87.

6 1958 Geneva Convention on the High Seas, Article 2(2); 1982 LOSC, Article 87(2).

7 Jennings and Watts, *supra* note 1, p. 729. It is worth noting that 'reasonable regard' was used in the High Seas Convention, but its significance is unclear. According to Churchill and Lowe, 'due regard' protects not only the interests of others exercising the freedom of the high seas but also the rights under the LOSC with respect to activities in the Area. See Churchill and Lowe, *The Law of the Sea* (1988) p. 146.

To further the purpose of this research, this Chapter discusses the freedom of fishing on the high seas. Within the freedoms of the high seas, fishing is one of the most important and long recognised freedoms.[8] This freedom is recognised in Article 2 of the 1958 Convention on the High Seas and Article 87 of the 1982 LOSC. The freedom of fishing on the high seas is based upon the supposition that the stocks of high seas fisheries were reasonably adequate to sustain fishing it, therefore vessels of all states enjoyed the freedom to fish on the high seas. However, after the Second World War, with the rapid improvement of science and maritime technology and the increased demand for the seas resources, developed countries with distant water fishing capabilities, such as Japan and the Soviet Union, created and made use of the technology to further explore and exploit the stocks of the high seas. This placed technically lesser developed states at a considerable disadvantage.[9]

In addition, most developing and lesser developed countries, given their lack of technology and capital, would be at a competitive disadvantage. This would lead to obsolete economies and permanent economic dislocation. Therefore, they were

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8 See *Behring Sea Fur Seals Arbitration Award 1893*; Moore, *History and Digest of the International Arbitration to which the United States Has Been A Party*, Vol. 1 (1898) p. 755.

9 Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas," 54 *AJIL* (1960) pp. 761-762; Kaczynski, "Alternatives Facing Distant-Waters Fishing States in the North-East Pacific," 6 *ODIL* (1979) pp. 73-102; Kwiatkowska, "Creeping Jurisdiction beyond 200 Miles in Light of the Law of the Sea Convention and State Practice," 22 *ODIL* (1991) pp. 153-187; Ouchi, "A Perspective on Japan's Struggle for its Traditional Rights on the Ocean," 5 *ODIL* (1978) pp. 107-135; Tanaka, "Japanese Fisheries and Fishery Resources in the Northwest Pacific," 6 *ODIL* (1979) pp. 103-163. Cf. UNCLOS I, *Official Records* (1958), Second Committee, 9th Meeting, paras. 29, 38 (per Peru); also Third Committee, 9th Meeting, para. 4 (per Ecuador).

convinced that the rules of the international legal system were unable to meet their interests and needs.[10] By extending their jurisdiction further seawards, they could protect domestic fishing concerns from foreign competition; prohibit or restrict exploitation of resources until there could be greater participation in its extraction or downstream economic exploitation.[11] Therefore, broader jurisdiction would be a bargaining chip for lesser developed countries when they negotiated with developed states. It would also form a basis upon which to develop their own economies. Under such circumstances, more and more coastal states sought to extend their authority over maritime zones adjacent to their coasts and establish different zones with different functions.[12] The nature of coastal states' claims to jurisdiction in extended maritime zones varied from state to state. Some states viewed the zones as an extension of their

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[10] Anand, "Role of the New Asian-African Countries in the Present International Legal Order," 56 *AJIL* (1962) p. 383; Copes, "Optimising the Use of Ocean Fish Resources in the Context of Extended National Jurisdictions," in English and Scott, eds., *Renewable Resources in the Pacific, Proceedings of the 12th Pacific Trade and Development Conference* (1982) pp. 33-36; Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987) p. 21.

[11] Oxman, "The Two Conferences," in Oxman, Caron, and Buderi, eds., *Law of the Sea: U.S. Policy Dilemma* (1983) p. 138; Scovazzi, "Explaining Exclusive Fishery Jurisdiction," 9 *Mar. Pol.* (1985) pp. 121-122; Alexander, "The Ocean Enclosure Movement: Inventory and Perspective," 20 *SDLR* (1983) pp. 561-594; Attard, *The Exclusive Economic Zone in International Law* (1987) pp. 1-31, 39-41.

[12] There are five different kinds of maritime zones each with different function: territorial sea, contiguous zone, exclusive economic zone, exclusive fishery zone, and continental shelf. For detailed data about national claims to these maritime zones, see 25 *LOS Bulletin* (June 1994).

territorial sea, with full territorial sovereignty.[13] Other states claimed fishery zones, with only the right to exploit and manage the living resources located within.[14] However, no matter what kind of zones they are called, by taking away fishing, they obviously lack an important part of the high seas freedom. Then this raised the question of the compatibility of such zones with international law, that is, can these zones be recognised by international law?

The ICJ's finding in the *Fisheries Jurisdiction* cases clarified this doubt.[15] Since fishing has always been an important economic activity and source of income for its nationals, the Icelandic government extended its 4-mile exclusive fishery zone to 12

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[13] One of the most famous cases about this is the Santiago Declaration on the Maritime Zone, which was signed in 1952 by Chile, Ecuador, and Peru. In the Santiago Declaration, the signatories claimed that a 200-mile 'maritime zone' was established from their respective coasts, within which they would exercise sovereignty and jurisdiction over the conservation of all living resources. See Declaration of Santiago, 18 August 1952. In Lay, Churchill, and Nordquist, comp. and eds., *New Directions in the Law of the Sea,* Vol. I (1973) p. 231.

[14] See 1972 Declaration of Santo Domingo and 1972 Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea. Reprinted in Lay, Churchill, and Nordquist, eds., *ibid.*, Vol. I (1973) pp. 247, 250. In the latter document, it reads:

> The African States have equally the right to establish beyond the territorial sea an Economic Zone over which they will have an exclusive jurisdiction for the purpose of control, regulation and national exploitation of the living resources of the sea.

[15] *Fisheries Jurisdiction* Case *(UK* v. *Iceland) I.C.J. Reports 1974*, p. 3; also Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights," 24 *ICLQ* (1975) pp. 32-105; Katz, "Issues Arising in the Icelandic Fisheries Case," 22 *ICLQ* (1973) pp. 83-108.

miles in 1958.[16] This measure resulted in a dispute with the UK and the Federal Republic of Germany, whose fishing vessels had traditionally fished in the area and a number of incidents took place between the Icelandic naval craft and British fishery protection vessels. Furthermore, Iceland again extended its exclusive fisheries zone from 12 miles to 50 miles on 14 July 1972[17] under the following considerations:[18]

> [B]ecause the continental shelf, the platform under the sea, on which the 50-mile limit was staged, was an integral part of the country territory and the fish stocks were a natural resource in precisely the same way as oil beneath the sea-bed ...
>
> [B]ecause Iceland has no other natural resources to speak of. Due to a work of nature, all her natural wealth lay in her coastal waters.

The UK objected to Icelandic government's decision on account of, according to a 1961 agreement between the UK and Iceland,[19] the British government shall be

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16 Jonsson, *Friends in Conflict: The Anglo-Iceland Cod Wars and the Law of the Sea* (1982) pp. 83-84.

17 *Ibid.*, p. 130.

18 Government of Iceland, Press Release, 20 August 1971, p. 1. Cited from Jonsson, *ibid.*, p. 126.

19 The controversial clause of this agreement is:

> The Icelandic Government will continue to work for the ... extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension...

See Exchange of Note between the UK and Iceland, 11 March 1961. In UN, *National Legislation and Treaties relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea* (1970) pp. 898-900.

given six-month notice of any extension of fisheries jurisdiction around Iceland.[20]

This matter was referred to the ICJ by the UK. The ICJ stated:[21]

> [T]he law evolved through the practice of States on the basis of the debates and near-agreements at the [1960] Conference. Two concepts have crystallised as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of the fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The Second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries.

It is clear that the ICJ accepted as lawful the establishment of 12-mile exclusive fishing zones even where the territorial sea was less than 12 miles. It accepted, furthermore, that in the case of the "coastal State in a situation of special dependence on its coastal fisheries", the coastal state might enjoy preferential or prior rights in adjacent seas beyond the 12-miles.[22] In practice, this concept was widely accepted and the establishment of EEZs and exclusive fishery zones became popular in the 1970's.[23]

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20 *Fisheries Dispute between the United Kingdom and Iceland, 14 July 1971-19 May 1973.* Cmnd. 5341, p. 9.

21 *Fisheries Jurisdiction* Case, *supra* note 15, para. 52.

22 Jennings and Watts, *supra* note 1, p. 788.

23 EEZ and EFZ claims of states are shown in the following table:

	1960's	1970's	1980's	1990's	TOTAL
EEZ	-	49	32	15	96
EFZ	1	19	-	-	20

See Brown, *The International Law of the Sea*, Vol. I (1994) pp. 246-247; and the latest update from R. Smith, see information at http://nisp.ncl.ac.uk/lists.f.j/int-boundaries/1996-02/0006.html.

Another development in the international law of the sea that gains clarification is the conservation and management of certain fish stocks. This is because states had acknowledged that marine resources, especially living resources, were considered inexhaustible. However, there is an incompatibility between traditional rights of free access, competitive fisheries, and a sensible utilisation of the fish stocks. Each individual fisherman is helpless to alter the course of the stocks and faces aggressive competition from other fishermen. His best strategy is to try to grasp his share as quickly as possible while the resource is still large enough to yield some profits. Naturally, this leads to reduced output and loss of economic benefits in ocean fisheries because the stocks being chased are over-exploited or even depleted by excessive fishing efforts engendered by economic competition. In other words, allowing for free access to the living resources of the sea has resulted in a well known phenomenon of economic inefficiency, over-capitalisation, over-exploitation and resource depletion.[24] This results in the development of the concept of conserving and managing living resources in the EEZ as well as in the high seas. The following sections focus on the fishing rights in three different zones: territorial sea, the EEZ, and the high seas.

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[24] Arnason, "Ocean Fisheries Management: Recent International Developments," 17 *Mar. Pol.* (1993) pp. 334-335; Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994) pp. 2-3; Christy and Scott, *The Common Wealth in Ocean Fisheries* (1965); Knight, *Managing the Sea's Living Resources* (1977); McDougal and Burke, *The Public Order of the Oceans* (1962) pp. 461-482, 933-941.

2. FISHERIES IN THE TERRITORIAL SEA

Coastal state jurisdiction is recognised to extend to all fisheries within one's national territory, embracing internal waters and the territorial sea. It is also universally agreed that a coastal state enjoys sovereignty over all living resources found within the limits of its state territory, including the territorial sea. Access to territorial sea resources by a foreign vessel requires authorisation by the coastal state. On the contrary, foreign vessels enjoy the right of innocent passage through the territorial sea, although this right can be lost "if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea."[25] This stipulation was further detailed in the LOSC. In Article 19(2), it reads:

> Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
>
> ...
>
> (i) any fishing activities;

However, because 'any fishing activities' is not clearly defined, it is up to the coastal states to define it at their own discretion. Therefore, a vessel whose fishing gear is not stowed could be treated as non-innocent.

The question of the breadth of a state's territorial sea has long been an issue in international law of the sea. This issue was addressed at the UNCLOS I, but no agreement was reached. The 1958 Geneva Convention on the Territorial Sea and the

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25 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 14(5).

Contiguous Zone was silent on the question. In this Convention, only Article 6 stipulates that

> The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

In 1960, the UNCLOS II was convened with the aim of solving the outstanding issues of the outer limit of the territorial sea and the extent of fisheries jurisdiction.[26] Although the proposal that a six-mile territorial sea plus a six-mile fishery zone measured from the same baseline was accepted widely during the UNCLOS II, this compromise formula failed to be approved by only one vote and the issue of the territorial sea breadth still remain unresolved.[27] In international practice, however more and more states have accepted the 12-nm territorial sea while publicly claiming so. Until 1960, 24 states had claimed the 12-nm territorial sea. By 1 January 1980, 80 states had claimed 12 nm territorial sea, with this figure rising to 121 by 31 January 1996.[28]

The issue of the breadth of the territorial sea was resolved in the UNCLOS III. Article 3 of the LOSC reads:

> Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

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26 UN Doc. A/CONF.13/L.56, 27 April 1958.

27 Anand, *supra* note 1, pp. 185-190; Churchill and Lowe, *supra* note 7, p. 13; Dean, *supra* note 9, pp. 751-789.

28 Smith, *Exclusive Economic Zone Claims* (1986) pp. 730-731. Also the latest update from R. Smith, see *supra* note 23.

Therefore, a coastal state can enjoy sovereignty over all living resources within its 12 nm territorial sea.

3. FISHERIES IN THE EXCLUSIVE ECONOMIC ZONE

Mentioning the development of the EEZ, US President Truman's two proclamations, 'Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf[29] and 'Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas'[30], are the keystones. They influenced and stimulated an international movement on extending maritime jurisdiction. The former proclamation asserted the US right to claim *jurisdiction and control over the natural resources* of the subsoil and sea-bed of the continental shelf adjacent to the US; the latter asserted the US authority to establish fishery conservation zones in the high seas adjacent to its coasts. It is noteworthy that both were aimed at acquiring control over the resources of the continental shelf, but not sovereignty over it. The US maintained a positive attitude towards the character of high seas and the freedom of navigation. This is completely different from the subsequent responses by many other states.[31] Some countries, especially the Latin American states which were

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29 U.S. Presidential Proclamation No. 2667, reprinted in Lay, Churchill, and Nordquist, eds., *supra* note 13, pp. 106-107.

30 U.S. Presidential Proclamation No. 2668, *ibid.*, pp. 95-96.

31 Selak, "Recent Development in High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945," 44 *AJIL* (1950) pp. 647-657; Johnston, *supra* note 1, pp. 232-233; Burke, *supra* note 24, p. 7. Cf. *Supra* note 13 and its accompanying text.

encouraged by the Truman Proclamations declared to extend their jurisdiction beyond their territorial seas unilaterally[32] or multilaterally[33], and requested to share the technology, capital, facilities, and benefits from developed countries.[34] These trends ultimately culminated in the formation of the EEZ. As of January 1996, 114 states claimed EEZ or EFZ.[35]

Except for the international practice, the ICJ also recognises the development of the EEZ. In *Tunisia/Libya* Case,[36] the ICJ referred to

> the concept of the exclusive economic zone ... may be regarded as part of modern international law.

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32 See Argentina, Decree No. 14708, 11 October 1946; Chile, Presidential Declaration Concerning the Continental Shelf, 23 June 1947; El Salvador, Constitution of 1950, 7 September 1950; Peru, Presidential Decree No. 781, 1 August 1947; Venezuela, Act on the Territorial Sea, the Continental Shelf, Protection of Fisheries and Air Space, 22 July 1956. For discussion, see Extavour, *The Exclusive Economic Zone* (1979) pp. 73-80; Garcia-Amador, "The Latin American Contribution to the Development of the Law of the Sea," 68 *AJIL* (1974) pp. 33-50; Hollick, "The Origins of 200-Mile Offshore Zones," 71 *AJIL* (1977) pp. 494-500; Szekely, "A Study of the Contribution of the Latin American States to the Development of the International Law of the Sea Since 1945," in *idem*, *Latin American and the Development of the Law of the Sea,* Part I (1986); Zacklin, ed., *The Changing of the Sea: Western Hemisphere Perspectives* (1974).

33 E.g., Declaration of Santiago, 18 August 1952; Montevideo Declaration on the Law of the Sea, 8 May 1970; Lima Declaration of the Latin American States on the Law of the Sea, 8 August 1970; Report of the Subcommittee on the Law of the Sea of the Asian-African Legal Consultative Committee, Colombo, 27 January 1971; Declaration of Santo Domingo, 9 June 1972; Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, Yaoundé, 30 June 1972; Organisation of African Unity Declaration on the Issues of the Law of the Sea, Addis Ababa, 24 May 1973.

34 Anand, *supra* note 1, pp. 162-163; Attard, *supra* note 11, pp. 17-26.

35 R. Smith's research result, *supra* note 23.

36 *Tunisia/Libya* Case, para. 100.

Similarly, in *Libya/Malta* case,[37] the ICJ expressed that it was

> incontestable that ... the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.

Hence, there is no doubt that the general concept of the EEZ has been accepted into the body of customary international law.[38]

Codification of the rights and duties associated with the EEZ is found in Articles 55 to 75 of the LOSC. Under the LOSC, the EEZ is defined as "an area beyond and adjacent to the territorial sea" whose maximum extent shall not exceed 200 nm.[39] Within its EEZ, a coastal state enjoys, *inter alia*, the basic legal entitlement to all living resources located within its EEZ.[40] With regards to conservation of the living

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[37] *Libya/Malta* Case, para. 34. Also *Jan Mayen* Case, para. 47.

[38] Cf. Bernhardt, "Custom and Treaty in the Law of the Sea," 205 *Hague Recueil* (1987-V) pp. 293-298; Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989) pp. 27-37.

[39] LOSC, Articles 55-57.

[40] LOSC, Article 56(1)(a) provides:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

resources,[41]

> 1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
>
> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation ...
>
> 3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield ...

Once the allowable catch has been determined, the coastal state is under obligation to promote the optimum utilisation of the living resources.[42] The coastal state may determine its own capacity to harvest resources within the EEZ. In the event that the coastal state does not have the capacity to harvest the entire allowable catch, it must grant other states access to the surplus of the allowable catch.[43]

Another development during the evolution of EEZ is the exclusive fishery zone. Basically, the EFZ was created specifically for regulating fishery activities. The 1958 Geneva Convention on the Fishing and Conservation of the Living Resources of the High Seas stipulates:[44]

> A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

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41 LOSC, Article 61(1)-(3).

42 LOSC, Article 62.

43 LOSC, Article 62(2). For the discussion about MSY, see Burke, *supra* note 24, pp. 45-55.

44 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Article 6(1).

Obviously, this would encourage the coastal state to extend its fishery jurisdiction over the area beyond its territorial sea. However, the 1958 Convention on the High Seas defines the high seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State."[45] It continues to provide that the freedom of fishing as included in the freedom of the high seas.[46] Therefore, it seems paradoxical that the creation of exclusive fishing zones is not compatible with what the Geneva Convention regulated.[47]

After the *Fisheries Jurisdiction* Case,[48] the extended fishing zone took its place in international practice. Nonetheless, the EFZ is different from the EEZ. In one way an EFZ claims less than the EEZ does, because it is confined to living resources of the water column. But in another way the EFZ might seem to claim more, for it does not *per se* import any treaty obligation to ensure the preservation or optimum utilisation of fishery resources, or indeed concern for the interests of other states or of the international community at large.[49]

The discussion of fisheries in the EEZ illustrates that the concept of 200-mile EEZ had been a customary international law and a coastal state has sovereign rights to explore, exploit, conserve, and manage the natural resources within its EEZ. However,

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45 1958 Geneva Convention on the High Seas, Article 1.

46 1958 Geneva Convention on the High Seas, Article 2.

47 Jennings, "General Course on Principles of International Law," 121 *Hague Recueil* (1967-II) pp. 380-382.

48 *Fisheries Jurisdiction* Case, *supra* note 15.

49 Jennings and Watts, *supra* note 1, p. 804, §345.

this right is not unlimited. It is necessary to safeguard the rights and duties of other states. The coastal state, in exercising its rights and performing its duties, shall have due regard for the rights and duties of other states and shall act in a manner compatible with the provision of the LOSC.[50]

After examining fisheries in the territorial sea and the EEZ, we will focus on the right of freedom of fishing in the following section.

4. FISHERIES IN THE HIGH SEAS

Freedom of fishing is one of the important freedoms of the high seas. Nonetheless, fishing without restriction would result in the depletion of the sea's living resources. Thus, in the 1960 UNCLOS II, participants had noticed the importance of conserving living resources in the high seas. Preventing the depletion of fishery resources from over-exploitation forms the main spirit of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. The Convention includes two general restrictions[51] on the high seas fishing, although it recognised that all states have the right for their nationals to engage in fishing on the high seas. These restrictions are:

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50 LOSC, Article 56(2). As for the rights and duties of other states, see Article 58.

51 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Article 1.

1. The interest and rights of the coastal state as provided for in the Convention. This means a coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.[52] Furthermore, any coastal state may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea.[53]

2. The provisions of the Convention concerning conservation of the living resources in the high seas. These provisions stipulate that any state which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources of the high seas in that area, may request the state or states whose nationals are engaged in fishing there to take the necessary measures of conservation under Articles 3 and 4 respectively.[54]

The development of fishing rights from the high seas freedom of fishing to the recognition of the 'special interest' of the coastal states is a first step on the way to general recognition of the exclusive jurisdiction of the coastal state over fisheries beyond its territorial sea.[55] Nonetheless, this Convention has proved to be largely a dead letter. Although it entered into force in 1966, it achieved significantly fewer

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52 *Ibid.*, Article 6(1).

53 *Ibid.*, Article 7(1).

54 *Ibid.*, Article 8(1).

55 Extavour, *supra* note 32, p. 121.

ratifications (only 36 signature states ratified) than the other 1958 Geneva Conventions on the Law of the Sea.[56] It was thought to go too far beyond customary law and to have been made redundant by the work of regional and national fishery commissions in various parts of the world.[57] Moreover, distant water fishing states, such as Japan and the former USSR, chose not to become parties to the Convention on Fishing and Conservation of the Living Resources of the High Seas. These fishing states opted to use the principle of freedom of the high seas to justify their continued exploitation of global fishery resources.[58]

The aforementioned developments of fisheries and other pressure of establishing an effective international regime over the seabed and the ocean floor beyond national jurisdiction[59] urged the adoption of two UN General Assembly resolutions: Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil thereof beyond the Limits of National Jurisdiction (Resolution 2749(XXV))[60] and Resolution 2750 (XXV) by which it was decided to convene a conference on the

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56 The Convention on the High Seas had 57 ratifications; the Convention on the Territorial Sea had 46 ratifications; and the Convention on the Continental Shelf had 54 ratifications. See Churchill and Lowe, *supra* note 7, Appendix I.

57 Shearer, "High Seas: Drift Gillnets, Highly Migratory Species, and Marine Mammals," in Kuribayashi and Miles, eds., *The Law of the Sea in the 1990s: A Framework for Further International Cooperation* (1992) p. 240.

58 Jacobson, "International Fisheries Law in the Year 2010," 45 *Louisiana LR* (1985) p. 1173.

59 Anand, *supra* note 1, pp. 195-197.

60 *GAOR*, 25th Session, Supplement, A/8028, 17 December 1970, p. 24.

law of the sea in 1973.[61] The former, in endorsing the concept of the common heritage of mankind, emphasised the necessity to establish the precise outer limits of the national jurisdiction of coastal states over the seabed and subsoil of submarine area; the latter provides the necessary forum for the elaboration of a compromise containing the desirable accommodation of conflicting interests.[62]

After a long and detailed discussion, UNCLOS III produced the LOSC which maintains the principle of freedom of fishing on the high seas but subjects its enjoyment to certain respects in the interests of coastal states. Article 87 of the LOSC states:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: ...
>
> (a) freedom of fishing, subject to the conditions laid down in section 2.

Obviously, freedom of fishing is for all states, including coastal and land-locked states. There are some conditions, however, in enjoying this freedom, which are outlined in Section 2 of the LOSC. Section 2, Article 116 commences with a restatement of Article 1 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas by providing that "All States have the right for their nationals to engage in fishing on the high seas ...", but it immediately specifies that the enjoyment of this right is subject to the following conditions:[63]

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61 *Ibid.*, p. 25.

62 Extavour, *supra* note 32, p. 174.

63 LOSC, Article 116. Cf. *infra* notes 149-150 and the accompanying text.

(a) their treaty obligations;
(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67;[64] and
(c) the provisions of this section.

This means that the high seas fishing states are obliged to recognise the interest of the coastal state as provided in Article 63(2) and thus accept the participation of coastal states in co-operative arrangements regarding transboundary and associated species between the EEZ of the coastal state and the adjacent high seas area.[65]

These conditions are counter to the traditional thinking concerning freedom of high seas fishing. In the traditional view of freedom of fishing, such freedom extends to all species and to all types of fishing gear. Nonetheless, this situation has fundamentally changed due to the extension of the territorial sea, the establishment of the EEZ, and the allocation of management competence over certain species. Therefore, two major restraints to the freedom of fishing on the high seas becomes apparent in recent years: the use of certain fishing gear and the fishing of certain fish species.[66]

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64 Article 63(2) concerns stocks occurring within the EEZ of two or more coastal states or both within the EEZ and in an area beyond and adjacent to it; Article 64 concerns highly migratory species; Article 65 concerns marine mammals; Article 66 concerns anadromous stocks; and Article 67 is dealing with catadromous species. See Burke, "Highly Migratory Species in the New Law of the Sea," 14 *ODIL* (1984) pp. 273-314; *Idem,* "Anadromous Species and the New International Law of the Sea," 22 *ODIL* (1991) pp. 95-131.

65 Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (1989) p. 55.

66 Burke lists four restraints: particular fish species, marine mammals, the use of certain gear, and catch and effort levels. See Burke, *supra* note 24, p. 84. For the purpose of this research, the author confines them to fishing gear and fish species.

5. RESTRICTIONS TO THE FREEDOM OF FISHING ON THE HIGH SEAS

5.1. ISSUE OF DRIFTNET FISHING

Driftnet is a simple fishing method, and it is so simple that it may well have been developed early and independently in different parts of the world. According to research, herring driftnet fishing was established around much of the North Sea by the 11th and 12th centuries. This method was expanded in the 16th and 17th centuries by the Dutch, who developed large industrial vessels for driftnetting on the high seas.[67] The North Sea herring driftnet fishery expanded further during the 18th and 19th centuries, so that by 1908 it was estimated that more than half a million tonnes of herring were being taken annually by the driftnet fleets. In the autumn of 1913, there were over 1,700 drifters operating from just two English ports, each deploying around 3 km of netting, 11 metres in depth, in the southern North Sea every night.[68]

As regards the modern driftnet fishing, it uses nylon monofilament nets allowing them to suspend vertically in the water to depths of approximately 30 feet, and forms a curtain which can be from 7 miles to 30 miles in width. Those nets drift independently, but are usually accompanied by a vessel which drifts with the nets attached to it. The fish, mostly free swimming pelagic species, such as herring, sardine,

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67 Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review*, *FAO Fisheries Technical Paper*, No. 320 (1991) p. 2.

68 *Ibid.*

anchovy, menhaden, mackerel, tuna, and salmon, swimming in shoals strike against the nets and are entangled by the gills in the meshes.[69] Because driftnetting is such a simple and fuel efficient way of fishing, it is widely accepted by many fishing nations in different fisheries. According to Northridge's report,[70] in Asia, Bangladesh, the PRC, Gulf states, India, Indonesia, Iran, Japan, Korea, Malaysia, Sri Lanka, Taiwan, and Thailand are using driftnets; in North and South America, Brazil, Chile, Peru, Trinidad, and the US are using this method; in Africa, Ghana, Morocco, Mozambique, Nigeria deploy driftnets; and in Europe, France, Greece, Greenland, Ireland, Italy, Spain, and the UK also use driftnets.

However, no matter how great the advantages that driftnet has, in view of the conservation and preservation of natural resources as well as the protection of the marine environment, its role would probably have become negative because of its environmental impact.[71] The points that concern environmental protectionists in general and the South Pacific countries in particular are:

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[69] Everhart and Youngs, *Principles of Fishery Science*, 2nd Edition (1981) p. 43; *Law of the Sea, Report of the Secretary-General,* UN Doc. A/44/650, 1 November 1989, paras. 114-117.

[70] Northridge, *supra* note 67.

[71] Nonetheless, some scholars dispute this view. See Burke, Freeberg, and Miles, "United Nations Regulations on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management," 25 *ODIL* (1994) pp. 127-186; Burke, *supra* note 24, pp. 272-274.

1. A threat to existing systems designed for the management and the conservation of those commercial species targeted by high seas driftnet vessels, e.g., tuna, salmon, and squid. The relative economic efficiency of driftnets when used to fish dispersed resources has also been taken to suggest that resource over-exploitation may occur more easily. Thus it may be claimed that as a fish stock is depleted, if it becomes more dispersed, while catch rates of other gears fall off rapidly, driftnet catch rates may continue at a level which is still economical, thereby enabling driftnet fisheries to deplete a species more quickly.[72]

2. With a low species selectivity, driftnet is easily characterised as a threat to wildlife or as the catch of non-target resources which is a waste of resources. Research confirms that the 41 million non-target species taken in conjunction with the Japanese 1990 harvest of 106 million squid was a number that appeared prominently in nearly every condemnation of the driftnet fisheries. This non-target harvest consisted of approximately 39 million fish, 700,000 blue sharks, 270,000 seabirds, 141,000

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[72] Northridge, *supra* note 67, p. 87; Sumi, "International Legal Issues concerning the Use of Driftnets with Special Emphasis on Japanese Practices and Responses," in FAO, *The Regulation of Driftnet Fishing on the High Seas: Legal Issues, FAO Legislative Study*, No. 47 (1991) p. 60.

salmon, 26,000 marine mammals, and 406 sea turtles.[73]

3. A threat to ecosystems caused by 'ghost' nets that have been lost or discarded. Those nets may continue to entangle marine living resources, such as fish and marine mammals, at the surface or on the seabed for a period of time. This is especially serious where large enough amounts of netting are being deployed, even a relatively small discard or loss rate may result in large amounts of lost netting, and concern has been expressed that such netting may continue to ensnare animals for some time, as the nylon is resistant to decay. According to estimates, more than 17 km of netting might be lost every night in the North Pacific, amounting to several thousand kilometres of netting per year.[74]

4. A threat to all vessels whose rudders, engines, or gear may become entangled and seriously damaged by lost or abandoned driftnets, because the non-biodegradable

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[73] Sumi, *ibid.*, p. 58; Burke, Freeberg, and Miles, *supra* note 71, pp. 144-145; Carr and Gianni, *High Seas Ecosystems, Large-Scale Driftnets and the Law of the Sea* (1991); Northridge, *supra* note 67, p. 2; Mizukami, "Fisheries Problems in the South Pacific Region," 15 *Mar. Pol.* (1991) p. 118; South Pacific Commission, *Report of the Third South Pacific Albacore Research Workshop,* Noumea, New Caledonia, 9-12 October 1990; Wright and Doulman, "Drift-net Fishing in the South Pacific: From Controversy to Management," 15 *Mar. Pol.* (1991) p. 313-314; "High Seas Drifting Nets Raise Fears for an Ocean's Fish," *The New York Times* (21 March 1989) pp. C6-7; "Strip-mining the South Seas," *Time* (19 March 1990) pp. 42-43.

[74] Eisenbud, "The Pelagic Driftnet," 27(4) *Oceanus* (1985), p. 76; FAO, *Report of the Expert Consultation on Large-Scale Driftnet Fishing, FAO Fisheries Report*, No. 434 (1990) p. 9; Sumi, *ibid.*, p. 66; Northridge, *ibid.*, p. 98.

nature of the nets, those lost or abandoned nets become a form of marine pollution in their own sight.[75]

The following discussion will deal with the actions taken by the South and North Pacific Ocean countries and the UN against driftnet fishing.

A. ACTIONS FROM SOUTH PACIFIC OCEAN STATES

The South Pacific island states are spread over an enormous sea area but with minute land area. There are about 7,500 islands which at present form twenty-three political entities.[76] The total land area is only 550,044 km², but in terms of the EEZ area for all island states here, the total EEZ area is 30,428,000 km². With such a huge area which is full of abundant living and non-living resources, the establishment and expansion of jurisdiction over this vast sea area becomes an important task for them. In addition, with abundant fishery resources, especially tuna, the development of the fishing industry plays an important role in their individual economies.[77]

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[75] Jacobson, "Future Fishing Technology and Its Impact on the Law of the Sea" in Christy, et al., eds., *Law of the Sea: Caracas and Beyond* (1975) p. 237; Joyner and Frew, "Plastic Pollution in the Marine Environment," *ODIL* (1991) p. 33; Johnston, "The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options," 21 *ODIL* (1990) pp. 9-10; Walls, "Oceans Apart over Tuna," *FEER* (6 April 1989) p. 89.

[76] Buchholz, "Development Tasks of Peculiar States: The Small Island Countries of the South Pacific," in *Idem,* ed., *New Approaches to Development Co-operation with South Pacific Countries* (1987) pp. 21-22.

[77] For the fishing industry of the South Pacific island states, see Doulman, "An Overview of the Tuna Fishery and Industry in the Pacific Islands Region," in Buchholz, ed., *ibid.*, pp. 149-161.

The large-mesh driftnet fishery was initiated as a result of Japanese exploratory driftnet fishing for slender tuna between 1982 and 1987.[78] Starting with about 10 to 20 Japanese vessels operating between 1983 and 1988, 64 Japanese vessels participated in this fishery in the 1988/89 season.[79] Then Taiwanese driftnet vessels entered the South Pacific Ocean in December 1987 while there were only 7 Taiwanese drifters operating in this region.[80] Attracted by an abundant harvest, about 60 to 130 Taiwanese drifters operated in the South Pacific in the 1988/89 fishing season.[81] As far as the catch size is concerned, a total surface fishery catch of 33,559 tons of albacore was estimated for the 1989/89 season.[82] Of this, 73% (or 24,447 tons) was estimated to have been harvested by driftnet fishing. The fast increasing efforts and production of driftnet fishing aroused great concern from the South Pacific states. They enacted their own legislation to prohibit the practice of driftnet fishing.

(A) INDIVIDUAL ACTIONS

In 1979, Australia had prohibited any fishing by 'trammel net, tangle net or gill net' off the coasts of New South Wales and Tasmania.[83] In 1986, driftnets were further

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78 South Pacific Commission, *Report of the Second South Pacific Albacore Research Workshop,* Suva, Fiji, 14-16 June 1989, p. 3.

79 *Ibid.*

80 *Ibid.*, pp. 4, 10.

81 South Pacific Commission, *supra* note 73, pp. 31-32.

82 *Ibid.*, p. 31.

83 Fisheries Notice No. 88 (19 July 1979) and No. 113 (4 August 1983).

prohibited in northern Australian waters in the area from Broome to Cape York.[84] On 20 July 1989, the Australian Prime Minister announced the prohibition of the use of driftnets longer than 2.5 km in the entire Australian Fishing Zone and their carriage through the zone unless appropriately stowed.[85] Besides, on 19 July 1991, Australia passed legislation prohibiting any combination of driftnets exceeding a total length of 2.5 km.[86]

The Cook Islands moved to prohibit driftnet fishing with its Marine Resources Act 1989.[87] According to the Act, driftnet fishing activities are defined as "fishing with the use of a driftnet and any related activities including transporting, transhipping, and processing any driftnet catch, and provision of food, fuel, and other supplies for vessels used or outfitted for driftnet fishing."[88] "No fishing vessel is to be used for or assist in any driftnet fishing activities in the Cook Islands or Cook Islands fishery waters and no fishing vessels registered in the Cook Islands is to be used for or may assist in driftnet fishing activities."[89] Finally, the Minister responsible for issuing foreign fishing licenses may deny an application for a license to any fishing vessel which has engaged in any driftnet fishing activities.[90]

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84 Fisheries Notice No. 182 (2 December 1986).

85 Fisheries Notice No. AFZ 1 (20 July 1989).

86 Australian Fisheries Management Act of 1991.

87 Marine Resources Act, No. 33 (1989).

88 *Ibid.*, Section 2.

89 *Ibid.*, Section 15.

90 *Ibid.*, Section 16.

New Zealand enacted the Driftnet Prohibition Act in 1991.[91] Under this Act, New Zealand nationals and vessels are prohibited from engaging in driftnet fishing within the Wellington Convention Area[92] and any vessel or person is prohibited from driftnet fishing within New Zealand's fishery waters.[93]

(B) COLLECTIVE ACTIONS

In addition to the individual states' legislations against driftnet fishing these states also took collective actions. On 11 July 1989, the member states of the South Pacific Forum Fisheries Agency (hereinafter cited as FFA)[94] convened at Tarawa, Kiribati, and proclaimed the Tarawa Declaration.[95] In the Tarawa Declaration, the member states[96]

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91 Driftnet Prohibition Act, 1991 NZ Stat. No. 18 (1991).

92 For Wellington Convention Area, see *infra* notes 101-102, and the accompanying text.

93 *Supra* note 91, Sections 4 and 5. Also see Davidson, "New Zealand: Driftnet Prohibition Act 1991," 6 *IJECL* (1991) pp. 264-271. Text is reproduced in 31 *ILM* (1992) p. 214.

94 The FFA was established under a convention signed by 12 South Pacific Forum member states. The convention reflects the common concern of member states on matters of conservation, optimum use and coastal states' sovereign rights over the region's living marine resources. Its governing body is the Forum Fisheries Committee (FFC) which decides the FFA's annual budget and work programmes. The member States of the FFA are as follows: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. About FFA, see generally Swan, "Highly Migratory Species: The South Pacific Forum Fishing Agency," in Soons, ed., *Implementation of the Law of the Sea Convention through International Institutions* (1990) pp. 318-343.

95 Tarawa Declaration, reprinted in 14 *LOS Bulletin* (December 1989) pp. 29-30.

96 *Ibid.*

recognising the crucial dependence of the Pacific Island peoples on marine resources;

profoundly concerned at the damage now being done by pelagic drift net fishing to the economy and environment of the South Pacific region;

...

determines ... to convene an urgent meeting of regional diplomatic, legal and fisheries experts to develop a Convention to give effect to its common resolve to create a zone free of drift net fishing;

...

commends the Republic of Korea for its decision to cease drift net fishing in the region;

calls on Japan and Taiwan to follow this example, and abandon immediately their damaging drift net operations.

In October 1989, a Resolution concerning Pelagic Driftnet Fishing in the South Pacific Commission Area[97] was adopted at the 29th South Pacific Conference in Guam.[98] The Resolution called for "an immediate ban on the practice of pelagic drift-gillnet fishing in the region to prevent severely adverse, perhaps irremediable, effects on South Pacific Commission region fisheries."[99]

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[97] Members of the South Pacific Commission include: Australia, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Kiribati, Marshall Islands, New Caledonia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands Tonga, Tuvalu, UK, USA, Vanuatu, Wallis and Futuna, and Western Samoa. Its governing body is the South Pacific Conference, consisting of representatives from member governments and administrations. Wright and Doulman, *supra* note 73, p. 317, 69n.

[98] Resolution concerning Pelagic Driftnet Fishing in the South Pacific Commission Area (Guam Resolution) was reprinted in Wright and Doulman, *supra* note 73, pp. 329-330. Members of the South Pacific Commission are Australia, Cook Islands, Federated State of Micronesia, Fiji, France, French Polynesia, Kiribati, Marshall Islands, New Caledonia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, UK, USA, Vanuatu, Wallis and Futuna, and Western Samoa.

[99] Guam Resolution, *ibid.*, Article 4.

Four months after the Tarawa Declaration, a meeting was held in Wellington, New Zealand, on 23 November 1989. Member states of the FFA adopted the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (also known as Wellington Convention) and two Protocols.[100]

The Wellington Convention has several significant points which demonstrate the will of these South Pacific Ocean island states. First, the 'Convention Area' shall be "the area lying within 10 degrees North latitude and 50 degrees South latitude and 130 degrees East longitude and 120 degrees West longitude, and shall also include all waters under the fisheries jurisdiction of any party to this Convention."[101] This Area actually covers a massive maritime area including high seas and waters under the fisheries jurisdiction of the parties.[102]

Secondly, 'driftnet' is defined as "a gillnet or other net or a combination of nets which is more than 2.5 kilometres in length the purpose of which is to enmesh, entrap

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100 'Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention), text reprinted in 29 *ILM* (1990) p. 1449; Final Act to the Wellington Convention, text reprinted in 29 *ILM* (1990) p. 1453; Protocol 1 to the Wellington Convention reprinted in 29 *ILM* (1990) p. 1462; Protocol 2 to the Wellington Convention reprinted in 29 *ILM* (1990) p. 1463. Signatories to the Wellington Convention are: Australia, Cook Islands, France, Kiribati, Federated States of Micronesia, Marshall Islands, New Zealand, Nauru, Niue, Palau, Solomon Islands, Tokelau, Tuvalu, the US, and Vanuatu. The US also signed Protocol 1. Canada and Chile signed Protocol 2. The Wellington Convention entered into force on 17 May 1991, 19 *LOS Bulletin* (October 1991) p. 41.

101 Wellington Convention, Article 1(a)(i).

102 About the justification of the 'Convention Area', see Hewison, "The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific," 25 *Case W. Res. J. Int'l L.* (1993) pp. 465-470.

or entangle fish by drifting on the surface of or in the water."[103] This became a standard definition of driftnet and started a trend in state practice.[104]

Thirdly, the driftnet fishing activities are defined as the actual or attempted catching, taking, or harvesting of fish with the use of a driftnet and in addition any support operations, including searching for or locating fish (including operations of placing, searching for, or recovering fish aggregating devices or associated electronic equipment such as radio beacons), transporting, trans-shipping, or processing any catch, or supplying provisions to driftnet fishing vessels (including the use of aircraft for this purpose).[105] Parties agreed to undertake to 'prohibit its nationals and vessels documented under its laws from engaging in driftnet fishing activities with the Convention Area.'[106] Parties also agreed to take measures consistent with international law to restrict driftnet fishing activities, this includes prohibition in areas under their jurisdiction of the use of driftnets, the transhipment, landing and processing of driftnet catches, and the possession of driftnets on fishing vessels. Besides, parties restrict port access and port servicing facilities for driftnet fishing vessels.[107]

A regional consensus to ban driftnetting had gained momentum in this region. In terms of unilateral legislation, South Pacific Ocean states enact laws on banning

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103 Wellington Convention, Article 1(b).

104 *Law of the Sea, Report of the Secretary-General,* UN Doc. A/44/650, 1 November 1989, p. 5, para. 10.

105 Wellington Convention, Article 1(c).

106 *Ibid.*, Article 2.

107 *Ibid.*, Article 3.

driftnet fisheries. As for collective actions, the South Pacific Ocean states together adopted a declaration and a convention to prohibit driftnet fishing. Obviously, a legal web of prohibiting driftnet fishery was formed in the South Pacific Ocean region. Not only for this, the actions from the states in the South Pacific Ocean also produced pressure in the international forum, the UN, on banning driftnetting. We shall look at this later.

B. ACTION FROM NORTH PACIFIC OCEAN STATES

As to the North Pacific, driftnet is one of the oldest forms of industrial capture for salmon, dating from the beginning of the commercial era in the mid-19th century.[108] Japan, South Korea, and Taiwan had driftnet fishing vessels operating in this region.[109]

As far as distant water fishing is concerned, Taiwan has employed two fishing methods in this area. Firstly, it is the squid driftnet fisheries. Driftnet for squid was

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[108] Cooley, *Politics and Conservation: The Decline of the Alaska Salmon* (1963) p. 43. Cited from Johnston, *supra* note 75, p. 6. Cf. Suzuki, "Description of Japanese Pelagic Driftnet Fisheries and Related Information," in FAO, *Report of the Export of the Expert Consultation on Large-Scale Pelagic Driftnet Fishing, FAO Fishery Report*, No. 434 (1990) p. 37; Northridge, *supra* note 67, p. 6.

[109] *Report of the Secretary-General, supra* note 104; also *Report of the Secretary-General, Large-Scale Driftnet Fishing and its Impact on Living Marine Resources of the World's Oceans and Seas*, UN Doc. A/46/615, 8 November 1991; *FAO Legislative Study*, No. 47 (1991), *The Regulation of Driftnet Fishing on the High Seas: Legal Issues.*

initiated by Japanese vessels in the autumn of 1978 in northwest Pacific waters.[110] The Taiwanese fishing industry adopted this method and began operations in 1980 increasing from 12 vessels in 1980 to 166 in 1988.[111] Secondly, large mesh driftnet fishery was involved in the driftnet fishing in the north Pacific. The origin of this fishery has been traced to a coastal driftnet fishery which began off the Pacific coast of Japan in the 1840's, targeting bluefin tuna. This method once disappeared in 1940 because of the decline of the bluefin tuna stock. After the Second World War, driftnet fishery was revived and continued to operate largely in coastal Japanese waters until the 1970's. During the 1970's, the fishery expanded from Japanese Pacific coastal waters to Japan's other coastal waters, and to offshore areas including the South China Sea and Yellow Sea. The range of target species was also expanded to include marlin, skipjack, and other tunas. In the late 1970's and the early 1980's, the fishery expanded further east in the Pacific and onto albacore stocks.[112] Details about Taiwanese vessels participating in this fishery is unknown. Nonetheless, it is reported that Taiwan started this fishery during the 1980's with 128 Taiwanese vessels operating in the Pacific.[113]

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[110] Fisheries Agency of Japan, *Squid Drift Gillnet Fishery,* Document submitted to the International North Pacific Fisheries Commission (1982), cited from Northridge, *supra* note 67, p. 29.

[111] Northridge, *ibid.*, pp. 31, 33.

[112] Northridge, *ibid.*, p. 46; also Fisheries Agency of Japan, *Marlin and Others Drift Gillnet Fishery,* Document submitted to the International North Pacific Fisheries Commission (1982).

[113] Northridge, *ibid.*

The premier forum for international discussion of the high seas driftnet problem in the North Pacific is the International North Pacific Fisheries Commission (INPFC), which was established by Canada, Japan, and the US pursuant to the International Convention for High Seas Fisheries of the North Pacific Ocean of 1952.[114] The INPFC was mainly designed to regulate the Japanese salmon fishery on the high seas of the North Pacific, because Japan had begun intensive fishing activities in the region since 1930's and had developed new technologies, such as floating canneries, in salmon fishing.[115] In addition, Japan had developed its high seas driftnet fishery for salmon since 1952, which present a serious menace to Canadian and American fishing industries which consider the Pacific salmon stocks a valuable fish resource.[116] During the process of the UNCLOS III, a consensus arose that the states in whose rivers anadromous stocks originate have the primary interest in and responsibility for such stocks.[117] This caused the INPFC to restructure itself in 1978

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[114] 205 *UNTS* 80; Koers, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations* (1973) pp. 97-100.

[115] Johnston, *supra* note 1, pp. 273-274; Jessup, "The Pacific Coast Fisheries," 33 *AJIL* (1939) p. 129; Bingham, "The Continental Shelf and the Marginal Belt," 40 *AJIL* (1946) p. 175.

[116] Copes, "The Law of the Sea and Management of Anadromous Fish Stocks," 4 *ODIL* (1977) p. 237; Cooley, *supra* note 108.

[117] This principle is provided in the 1982 *LOSC*, Article 66(1). For the discussion in the UNCLOS, see Nordquist, et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (1993) pp. 667-679. For the discussion on anadromous stocks, see Hey, *supra* note 65, pp. 63-66; Islam, "The Proposed 'Driftnet-Free Zone' in the South Pacific and the Law of the Sea Convention," 40 *ICLQ* (1991) pp. 186-188; Mirovitskaya and Haney, "Fisheries Exploitation as a Threat to Environmental Security: The North Pacific Ocean," 16 *Mar. Pol.* (1992) p. 253.

and a displacement of Japanese vessels which withdrew them from the US fishery zone and certain high seas areas of the Bering Sea.[118] Originally, driftnet fishing was confined to Japanese vessels in the high seas areas of the North Pacific designated by the INPFC, but this fishery has expanded in scale and location, especially after the participation of two important distant water fishing states, Taiwan and South Korea.[119] Neither of them are member states of the INPFC, so were not restricted by the Commission. Obviously, there is no appropriately broad-based, regulatory instrument for driftnet fishery in this area.

Although driftnet fishing concerns high seas fishing, from the view point of Canada and the US, they are convinced that driftnets would produce an adverse impact on the stocks migrating in their EEZs. To prevent any negative impact, Canada and the US took action. Canada banned high-seas-type driftnet within the limits of its 200 nm EEZ.[120] The US adopted a legislative and judicial avenue to enforce relevant regulations:

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[118] Protocol amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, Annex, Article 1, 30 *United States Treaties and Other International Acts Series* 9242; also Hey, *ibid.*, pp. 271-274.

[119] Johnston, *supra* note 75, p. 12.

[120] Johnston, *ibid.*, p. 13.

(1) The Magnuson Fishery Conservation and Management Act of 1976.[121] The Magnuson Act was designed to preserve US marine resources for US fishermen. Through the Magnuson Act, the US government assumed complete jurisdiction in managing the marine resources within its 200-mile coastal zone and the anadromous species spawned from its rivers.

(2) The Fishermen's Protection Act of 1967.[122] The US executive branch is required to negotiate agreements with states that use high seas pelagic driftnets for the purpose of producing information about the impact of such fishing upon US marine resources, which are considered by the US to include fish that migrate beyond its 200-mile EEZ to the high seas. If these negotiations do not produce agreements with the designated nations by a certain date, the US President may place an embargo on fish and fish products from the nation concerned.[123]

(3) The Driftnet Impact, Monitoring, Assessment, and Control Act of 1987 (the

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[121] 16 *U.S.C.* 1801-1882 (1982 & Supp. V 1987). For Magnuson Act, see Aikman, "Island Nations of the South Pacific and Jurisdiction over Highly Migratory Species," 17 *VUWLR* (1987) pp. 101-124; Finch, "Fishery Management under the Magnuson Act," 9 *Mar. Pol.* (1985) pp. 170-179; Turgeon, "Fishery Regulation: Its Use under the Magnuson Act and Reaganomics," 9 *Mar. Pol.* (1985) pp. 126-133; Miller, Hooker, and Fricke, "Impression of Ocean Fisheries Management under the Magnuson Act," 21 *ODIL* (1990) pp. 263-287.

[122] 22 *U.S.C.* 1971-1980 (1982 & Supp. V 1987).

[123] Burke, *supra* note 24, p. 129.

Driftnet Act).[124] Under the Driftnet Act, it identified driftnetting as the key culprit in depleting the US marine resources, in particular, the salmon stock. The Driftnet Act requires the Secretary of Commerce, through the Secretary of State and in consultation with the Secretary of Interior to initiate

> negotiations with each foreign government that conducts, or authorizes its nationals to conduct, driftnet fishing that results in the taking of marine resources of the United States in waters of the North Pacific Ocean outside of the exclusive economic zone and territorial sea of any nation, for the purpose of entering into agreements for statistically reliable co-operative monitoring and assessment of the numbers of marine resources of the United States killed and retrieved, discarded, or lost by the foreign government's driftnet fishing vessels.[125]

Furthermore, the Secretary of State is required to initiate negotiations with foreign high seas driftnet fishing nations in order to enter into agreements "for effective enforcement of laws, regulations, and agreements applicable to the location, season, and other aspects of the operations" of the foreign driftnet fishing vessels.[126] If a foreign government failed to enter into and implement an agreement under the sections mentioned above, the Secretary of Commerce must certify such facts to the

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[124] The Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Public Law No. 100-200, 16 *U.S.C.* 1822 (Supp. V 1987).

[125] Driftnet Act, Section 4004(a).

[126] Driftnet Act, Section 4006(a).

President, who has the authority under Section 8(a) of the Fishermen's Protective Act of 1967, to decide whether to place an embargo on products from that nation.[127]

C. UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS ON DRIFTNET FISHING

Under the influence of the US and the South Pacific Ocean states, two important resolutions were adopted by the UN General Assembly. In November 1989, the US tabled a resolution in the Second Committee of the UN General Assembly, calling for a complete ban on driftnet fishing in the South Pacific Ocean.[128] At the same time, Japan also tabled another resolution on driftnet fishing, calling for conclusive scientific evidence to be produced prior to the consideration of the driftnet ban and urging co-operation among states concerned with respect to regulation and monitoring to mitigate adverse effects.[129]

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[127] Song, "United States Ocean Policy: High Seas Driftnet Fisheries in the North Pacific Ocean," 11 *CYILA* (1991-92) pp. 107-108. Another similar act, Marine Mammal Protection Act, also stipulates mandatory trade sanctions provisions. With this act, the US imposed trade restrictions on tuna imports from Mexico. However, a GATT dispute settlement panel ruled that the U.S. embargo on imports of Mexican yellowfin tuna constituted a trade barrier. See "Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna," 30 *ILM* (1991) p. 1594. Cf. *Commission of the European Communities* v. *Kingdom of Denmark* (*Danish Bottles* Case) [1988] *E.C.R.*, p. 4607.

[128] UN Doc. A/C.2/44/L.30, Rev. 1, 1989. It was cosponsored by Australia, Bahamas, Canada, Fiji, Mauritania, Mexico, New Zealand, Papua New Guinea, Solomon Islands, Sweden, Vanuatu, and Zaire.

[129] UN Doc. A/C.2/44/L.28, 1989.

After debate in the General Assembly, on 22 December 1989, the Second Commission of the UN General Assembly adopted by consensus Resolution 44/225[130] which calls on all members of the international community to implement

> (A) Moratoria on all large-scale pelagic driftnet fishing on the high seas by 30 June 1992, with the understanding that such a measure will not be imposed in a region or, if implemented, can be lifted should effective conservation and management measures be taken based upon statistically sound analysis to be jointly made by concerned parties of the international community with an interest in the fishery resources of the region, to prevent unacceptable impacts of such fishing practices on that region and to ensure the conservation of the living marine resources of that region;
>
> (B) Immediate action to reduce progressively large-scale pelagic driftnet fishing activities in the South Pacific region leading to the cessation of such activities by 1 July 1991, as an interim measure, until appropriate conservation and management arrangements for South Pacific albacore tuna resources are entered into by the parties concerned;
>
> (C) Further expansion of large-scale pelagic driftnet fishing on the high seas of the North Pacific and all the other high seas outside the Pacific Ocean should cease immediately, with the understanding that this measure will be reviewed subject to the conditions in paragraph 4 (a) of the present resolution.

Resolution 44/225 is a compromise between US and Japanese sponsored groups. In the Japanese view, the impact of this resolution is rather weak because Japan has more fishing interests in the North Pacific than in the South Pacific and such interest was secured.[131] Nonetheless, for the South Pacific states and territories, they are not satisfied with the result of this resolution, because they wanted an immediate

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130 UN Doc. A/C.2/44/L.81, 22 December 1989.

131 Burke, Freeberg, and Miles, *supra* note 71, p. 142.

termination of driftnet fishing in the region as expressed in the Tarawa Declaration and the Guam Resolution.[132]

Another resolution (46/215) was adopted by the UN General Assembly on 20 December 1991,[133] in which a definite date was set to terminate the driftnet fisheries:

> 3. *Calls upon* all members of the international community to ... [take] the following actions:
>
> (a) Beginning on 1 January 1992, reduce fishing effort in existing large-scale pelagic high seas drift-net fisheries by, *inter alia,* reducing the number of vessels involved, the length of the nets and the area of operation, so as to achieve, by 30 June 1992, a 50 per cent reduction in fishing effort;
>
> (b) Continue to ensure that the areas of operation of large-scale pelagic high seas drift-net fishing are not expanded and, beginning on 1 January 1992, are further reduced in accordance with paragraph 3 (a) of the present resolution;
>
> (c) Ensure that a global moratorium on all large-scale pelagic drift-net fishing is fully implemented on the high seas of the world's oceans and seas, including enclosed seas and semi-enclosed seas, by 31 December 1992. [brackets added]

UN resolutions are only recommendations to its members, as the ICJ states in the *Voting Procedure* Case,[134]

> [I]t is in the nature of recommendations that, although on proper occasions they provide a legal authorisation for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them. [brackets added]

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[132] Wright and Doulman, *supra* note 73, p. 319. For Tarawa Declaration, see *supra* note 95; for Guam Resolution, see *supra* note 98.

[133] United Nations General Assembly Resolution on Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas, reproduced in 31 *ILM* (1992) p. 241.

[134] *Voting Procedure* Case, *I.C.J. Reports* 1955, p. 115. About the effect of the UN resolutions, see Sloan, "General Assembly Resolutions Revisited (Forty Years After)," 58 *BYIL* (1987) pp. 39-150.

However, Preamble paragraph 8 of the Resolution 44/225 asserts that all members of the world community have a duty to co-operate in the conservation and management of the living resources of the high seas, and a duty to take, or to co-operate with others in taking, such measures for their nationals as may be necessary for the conservation of the living resources of the high seas.[135] Moreover, the acceptance of the two resolutions by high seas fishing states also provides strong confirmation that conservation measures on the high seas are considered as least formally obligatory.[136]

D. REMARKS

The development and the diminishment of the driftnet fisheries is a good example for the recent development of the Law of the Sea. Owing to the fishing technology and capital, driftnetting became an economical and beneficial high seas fishing method in the 1980's. Environmental protection led, however, to driftnetting being nicknamed 'Wall of Death' and banned in the early 1990's. The whole procedure illustrates the freedom of fishing on the high seas is not unrestricted, distant water fishing states who enjoy this freedom have to pay due regard to the rights and interests of the coastal states. Otherwise, the depletion of stocks in the high seas could impact the adjacent EEZs and the coastal states which claim such zones. This would lead to another issue, the straddling and highly migratory fish stocks, which we will discuss in the following section.

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135 *Supra* note 130.

136 Burke, *supra* note 24, p. 103.

5.2. ISSUE OF STRADDLING AND HIGHLY MIGRATORY FISH STOCKS

According to the stipulation in the LOSC, straddling stocks are defined as stocks of associated species occurring both within the EEZ and in an area beyond and adjacent to it.[137] As for highly migratory species, there is no operational definition on such species but a list of seventeen highly migratory species is provided in Annex I to the LOSC. Nonetheless, some species can be treated as either straddling or highly migratory species, depending upon the view point.[138]

The issue of straddling stocks and highly migratory species focuses on the conservation of living resources in the high seas area, which involves conflicting interests of the coastal states and the high seas fishing states. The coastal state's interest in a straddling stock differs from that of a state exercising the high seas freedom of fishing in the area. The interest of the latter may be primarily in the exploitation of the resource on the high seas. This may be a short-term or a long-term interest depending on the structure of that state's fishing fleet and the extent of the straddling stock available for exploitation. By contrast, the coastal state, whether or not it is interested in the high seas exploitation of the straddling stock, will always have an interest in the long-term viability of the stock. This may result from its interest in the exploitation of the stock by its nationals or others within 200 miles, or from its specific responsibilities under the LOSC in respect of the conservation and management of that

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[137] LOSC, Article 63(2).

[138] Such as the conflicts between the US and Mexico and several central American states, see *infra* note 144 and its accompanying text. Also see *FAO Fisheries Technical Paper*, No. 337 (1994) pp. 4-8.

stock.[139] Therefore, the underlying issue is coastal state's interest in the fisheries beyond the EEZ and in stocks which are inseparable from such zone in terms of management and conservation.[140]

The straddling and highly migratory fish stocks issues have become pressing issues that attracted international attention since the late 1980's. These matters affect the interests of various coastal states in different maritime areas. In the case of the Northwest Atlantic,[141] the catch of cod and other species on the Grand Banks by some distant water fishing states, mainly from the EU,[142] beyond Canadian 200-mile fishing

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[139] UN, *The Regime for High-Seas Fisheries, Status and Prospects* (1992) p. 30, para. 98.

[140] Burke, *supra* note 24, p. 84; Vicuña, "Towards an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea: The View of Developing Countries Ten Years after the Signature of the Law of the Sea Convention," in Miles and Treves, eds., *The Law of the Sea: New Worlds, New Discoveries* (1993) p. 415.

[141] Applebaum, "The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action," in Soons, ed., *supra* note 94, pp. 282-317; Burke, *supra* note 24, p. 85; *FAO Fisheries Technical Paper*, No. 337 (1994) pp. 54-59; Miles and Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks," in Clingan and Kolodkin, eds., *Moscow Symposium on the Law of the Sea* (1991) pp. 218-220.

[142] Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries," 25 *ODIL* (1994) pp. 297-305. On 9 March 1995, Canada arrested a Spanish trawler fishing for Greenland halibut off the Grand Banks. This incident caused conflict between Canada and the EU. See *The Times* (11 March 1995) p. 11 and (17 April 1995) pp. 1, 7. On 28 March 1995, Spain submitted this case to the ICJ. See *ICJ Communiqué*, No. 95/9, 29 March 1995. However, the EU and Canada reached an Agreement on Fisheries (Greenland halibut) 16 April 1995. See 28 *LOS Bulletin* (1995) p. 34.

zone has interfered with Canadian conservation and management measures for the same stocks within its fishing zone.

In the high seas area of the central Bering Sea, the catch of pollack has allegedly reduced the abundance of such species in the adjacent EEZs of the US and Russia and is inconsistent with conservation measures established on the same stock within these adjacent zones.[143]

In the East Central Pacific region, the issue concerns the access to tuna between the US and some Central American states. On the one hand, the US maintains that the coastal states may not manage tuna within their EEZs, because tuna falls into a class of highly migratory species. From this view point, effective conservation is not possible except within the context of a regional organisation that includes both coastal and distant water fishing states. Moreover, the coastal states may not manage tuna within their EEZs except pursuant to and in conformity with decisions adopted by the appropriate regional organisation. On the other hand, Mexico and other Central American states reject this view and insist on the right to manage all highly migratory species, including tuna, within their EEZs. Furthermore, Mexico sees the tuna conflict

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[143] Burke, *supra* note 24, p. 84; *Idem,* "Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries," 16 *Ecology Law Quarterly* (1989) pp. 285-310; Canfield, "Recent Developments in Bering Sea Fisheries Conservation and Management," 24 *ODIL* (1993) pp. 257-289; Meltzer, *ibid.*, pp. 283-290; Miles and Burke, *supra* note 141, pp. 226-228; Miovski, "Solutions in the Convention on the Law of the Sea to the Problem of Overfishing in the Central Bering Sea: Analysis of the Convention Highlighting the Provisions Concerning Fisheries and Enclosed and Semi-Enclosed Seas," 26 *SDLR* (1989) p. 537.

with the US as a straddling stock problem. For this reason, the major controversy centres on the allocation of the benefits of fishing, rather than conservation alone.[144]

In the area off Chilean and Peruvian coasts, Chilean jack mackerel (*Trachurus murphyi*) is the main target of Russia and some Eastern European countries. The Chileans suspect that the fishery conducted beyond 200 miles by foreign fishing fleets may be of larger adult fish, whereas the fishery within 200 miles may be of younger fish of the same stock. Such a situation would cause depletion of this stock.[145]

In other areas, Argentina is addressing the issue of harvesting of the southern blue whiting and poutassou stocks on the Patagonian shelf,[146] while New Zealand concerns itself with the harvest of the orange roughy stock from off the west coast of the South Island of New Zealand.[147]

A. THE LOSC REGIME ON HIGH SEAS FISHERIES

Article 87 of the LOSC sets out the traditional principle of freedom of fishing on the high seas, embodied in the 1958 Geneva Convention on the High Seas and well

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[144] Meltzer, *ibid.*, pp. 313-315; Miles and Burke, *ibid.*, pp. 220-223; Burke, "Highly Migratory Species in the New Law of the Sea," 14 *ODIL* (1984) pp. 273-314.

[145] Miles and Burke, *ibid.*, p. 224; Dalton, "The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent," 8(3) *Marine and Coastal Law* (1993) pp. 399-403; Joyner and De Cola, "Chile's Presential Sea Proposal: Implications for Straddling Stocks and the International Law of Fisheries," 24 *ODIL* (1993) pp. 99-121.

[146] Meltzer, *supra* note 142, pp. 273-274; Miles and Burke, *ibid.*, pp. 225-226.

[147] *Supra* note 139, p. 22; Meltzer, *ibid.*, pp. 294-296.

established in customary international law. This freedom is available to the nationals of all states and it implies a right to have the opportunity to share in the resources of the high seas. But Article 87, paragraph 2, also makes clear that the freedoms provided are to be exercised with 'due regard' for the interests of other states in their exercise of the freedoms of the high seas,[148] and freedom of fishing on the high seas is expressly subject to the obligations set out in Part VII, Section 2, Article 116 of the LOSC:

> All States have the right for their nationals to engage in fishing on the high seas subject to:
> (a) their treaty obligations;
> (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and
> (c) the provisions of this section.

Pursuant to this article, two limitations are clear. First, it provides that states "have the right for their nationals to engage in fishing on the high seas", thereby entitling the nationals of any state to participate in the activity of high seas fishing, but it does not guarantee fishing in all areas of the high seas at any time. Instead, it subjects this freedom to other treaty obligations and 'subject to' certain specified provisions of the LOSC. Secondly, those fish stocks specified in paragraph (b) also come under limitations. In other words, those straddling and high migratory stocks are not within the scope of high seas freedom. Therefore, the freedom to fish on the high seas is not absolute.[149] In view of exploitation and conservation for high seas fisheries, the high

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148 *Supra* note 7.

149 *Supra* note 139, p. 8; Burke, *supra* note 24, p. 95; Hey, *supra* note 65, pp. 53-68.

seas fishing state is not solely competent to decide, but a coastal state is a necessary associate.[150]

The obligation of states to co-operate in the conservation and management of living resources is set out in Article 118. More specifically, in terms of straddling and highly migratory species, according to LOSC,[151] Article 63(2) places an obligation on the coastal states and states that are engaged in fishing on the high seas for stocks that 'occur both within the exclusive economic zone and in an area beyond and adjacent to that zone' to seek to agree on conservation measures necessary for the conservation of these stocks in the adjacent area. This co-operation may be effected through bilateral or other agreements or may take place through appropriate subregional and regional organisations. In effect, Article 63(2) envisages co-operation between these states as the mechanism for the conservation of these resources in an area of high seas adjacent to the EEZ.[152] Article 64 imposes an obligation on coastal states and 'other states whose nationals fish in the region' for high migratory species. This co-operation is designed to ensure conservation and promote 'the objective of optimum utilisation' of these species 'both within and beyond the exclusive economic zone'. If no appropriate international organisation exists for ensuring such co-operation, Article 64 provides

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150 Burke, *ibid.*, pp. 132-133.

151 LOSC, Articles 63 and 64.

152 *Supra* note 139, p. 10.

that the coastal state and other states that fish the species 'shall co-operate to establish such an organisation and participate in its work'.[153]

It should be clear that in order to keep the best interest in fisheries, both coastal states and high seas fishing states have the obligation to co-operate in the conservation and management of the straddling and highly migratory species. However, it remains unclear precisely how the rights and obligations of states are to be met.[154] This obscurity leads to the following conferences, in which the participants wanted to clarify the rights and obligations.

B. INTERNATIONAL CONFERENCES SINCE 1990

Various countries concerned elaborated on management and conservation in the Conference on Conservation and Management of High Seas Living Resources held in St. John, Terranova, in 1990. They emphasised the adoption of measures to avoid adverse effects of high seas fisheries on living resources under coastal state jurisdiction together with the concept that management of straddling stocks in the high seas must be consistent with the management regime applied in the EEZ.[155]

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153 *Ibid.*, pp. 10-11.

154 *Marine Fisheries and the Law of the Sea: A Decade of Change, FAO Fisheries Circular*, No. 853 (1993) p. 40.

155 Vicuña, *supra* note 140.

Another meeting of experts from Canada, Chile, and New Zealand, held in Santiago on 17 May 1991, was followed by a larger gathering that met in New York on 26 July 1991 with the participation of Argentina, Australia, Barbados, Brazil, Canada, Chile, New Zealand, and the FFA. The scope of these meetings was broader since they addressed a whole range of issues relating to the conservation and management of living resources of the high seas above and beyond the question of straddling stocks.[156]

An International Conference on Responsible Fishing was held in Cancun, Mexico, 6-8 May 1992, and was attended by delegations from 77 states. The Conference defines 'responsible fishing' in its Declaration:[157]

> the sustainable utilisation of fisheries resources in harmony within the environment; the use of capture and aquaculture practices which are not harmful to ecosystems, resources or their quality; the incorporation of added value to such products through transformation processes meeting the required sanitary standards, the conduct of commercial practices so as to provide consumers access to good quality products.
>
> ...
>
> The freedom of States to fish on the high seas must be balanced with the obligation to co-operate with other States to ensure conservation and rational management of the living resources, in accordance with relevant provisions of UNCLOS.
>
> ...
>
> [T]o call upon the Food and Agricultural Organisation of the United Nations to draft in consultation with relevant international organisations, an International Code of Conduct for Responsible Fishing, taking into account this Declaration. [brackets added]

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156 *Ibid.*, p. 424.

157 UN Doc. A/CONF.151.15, Annex.

The FAO led the drafting of an international code of conduct for responsible fishing which resulted in a Draft Code of Conduct for Responsible Fisheries on 29 September 1995.[158]

One month after the Cancun Conference, the United Nations Conference on Environment and Development (UNCED) was held on 3-14 June 1992, in Rio de Janeiro, Brazil,[159] its agenda being to develop a comprehensive programme for nations in pursuing sustainable development.[160] Nonetheless, this purpose was not achieved in the UNCED. From the view of the coastal states, high seas fishing must be conducted with no adverse impact on stocks found within coastal states jurisdiction. This view rests on the notion that there is a relationship between outside fishing, whether for highly migratory or straddling stocks, and the abundance of the same or associated stocks within the EEZ.[161] On the other hand, from the view of those high seas fishing states, all states must observe the provisions of the LOSC on high seas fishing. This position was reinforced at the Conference by insisting that the exclusive right to prescribe for flag state fishing vessels on the high seas is an indispensable element of national sovereignty that cannot be modified even by consent.[162]

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158 See document at gopher://gopher.undp.org:70/00/unearch/organizations /fao/databases.

159 Also known as Rio Conference.

160 Scully, "Report on UNCED," in Miles and Treves, eds., *supra* note 140, p. 97.

161 UNCED Doc. A/CONF.151/PC/WG.II/L.16/Rev.1, 16 March 1992; Burke, "UNCED and the Oceans," 17 *Mar. Pol.* (1993) pp. 522-523.

162 Burke, *ibid.*, p. 524.

Therefore, more attention was paid to the marine environment protection issue in Chapter 17 of Agenda 21.[163] The seven programme areas of Chapter 17 illustrate this situation:

1. Integrated management and sustainable development of coastal areas, including EEZs.
2. Marine environmental protection.
3. Sustainable use and conservation of marine living resources of the high seas.
4. Sustainable use and conservation of marine living resources under national jurisdiction.
5. Addressing critical uncertainties for the management of the marine environment and climate change.
6. Strengthening international, including regional, co-operation and co-ordination.
7. Sustainable development of small islands.

Apart from this, Agenda 21 also called for subsequent UN actions to convene international conferences[164]

> [W]ith a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks ... The work and the results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea, in particular the rights and obligations of coastal States and States fishing on the high seas. [brackets added]

Following the UNCED, the UN General Assembly, with Resolution 47/192, approved an intergovernmental conference on straddling and highly migratory fish

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163 For text, see Johnson, ed., *The Earth Summit: The United Nations Conference on Environment and Development (UNCED)* (1993) pp. 307-331.

164 UNCED, *Agenda 21: Programme of Action for Sustainable Development* (1993) p. 155.

stocks which convened in 1993.[165] The Conference aimed to accomplish the following tasks: (A) Identify and assess existing problems related to the conservation and management of straddling fish stocks and highly migratory fish stocks; (B) Consider means of improving fisheries co-operation among States; (C) Formulate appropriate recommendations. Starting from April 1993, six sessions were held at the UN headquarters.[166] The participating states can be categorised into three main groups based on different national interests. First, the coastal states group (Chile, Colombia, Ecuador, and Peru) linked with activist coastal states (Canada, Argentina, and Norway). Secondly, the high seas fishing group (Japan, Korea, Poland, and the PRC). Thirdly, the moderate reformist coastal states (Australia and New Zealand).[167]

During the meetings, several issues emerged as focal points:[168]

1. The nature of conservation and management measures to be established through co-operation;
2. The mechanisms for international co-operation;
3. Regional fisheries management organisations or arrangements;
4. Flag state responsibilities;

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165 UN General Assembly Resolution 47/192, 22 December 1992.

166 First session: 19 to 23 April 1993; Second session: 12 to 30 July 1993; Third session: 14 to 31 March 1994; Fourth session: 15 to 26 August 1994; Fifth session: 27 March to 12 April 1995; Sixth session: 24 July to 4 August 1995.

167 Barston, "United Nations Conference on Straddling and Highly Migratory Fish Stocks," 19 *Mar. Pol.* (1995) p. 160. Although as a major fishing state, Taiwan was not invited to the Conference. For discussion on Taiwan's international status, see Chapter 3, especially Sections 4 and 5; for discussion on Taiwan's inability to participate in international organisations and conclude agreements with other states, see Chapters 7 and 8.

168 Chairman's Negotiating Text, UN Doc. A/CONF.164/13, 30 July 1993.

5. Compliance and enforcement of high seas fisheries, conservation and management measures;
6. Port state responsibilities;
7. Non-parties to a subregional or regional agreement or arrangement;
8. Dispute settlement;
9. Compatibility and coherence between national and international conservation measures for the same stocks;
10. Special requirements of developing countries;
11. Review of the implementation of conservation and management measures.

The positions of the coastal states and high seas fishing states were often quite divergent. Among the most contentious issues was that of compatibility and coherence. Many high seas fishing states argued that the conference should consider conservation and management measures for the fish stock as a biological unit over its entire range of distribution, not divided along political boundaries. This view led to the argument calling for compatibility between conservation and management measures in EEZs and on the high seas, denying any special interests of coastal states to ensure that measures on the high seas are consistent with the conservation and management measures within the adjacent EEZ. On the other hand, many coastal states considered this position as compromising their sovereign rights over the living resources within the EEZ as provided for under the LOSC. Delegates from coastal states questioned the mandate of the conference to consider conservation and management of fish stocks within the EEZ and not just on the adjacent high seas beyond national jurisdiction.[169]

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[169] Meltzer, *supra* note 142, p. 326. Also reports in *ENB*, document at http://www.iisd.ca/linkages/vol07/0716021.html.

This argument was clarified when an agreement of this conference was adopted on 4 August 1995.[170] Article 7, paragraph 1, of the Agreement explicitly stipulated the compatibility of conservation and management measures: with respect to straddling stocks, coastal states and high seas fishing states shall seek to agree upon the measures necessary for the conservation of these stocks; with respect to highly migratory species, coastal states and high seas fishing states shall co-operate with a view to ensuring conservation and promoting the objective of optimum utilisation of such stocks throughout the region. It also requires, *inter alia*, that conservation and management measures within EEZs and the high seas shall be compatible, and describes the factors to be accounted for in determining compatibility.

Paragraph 2 continues to provide that conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal states and high seas fishing states have a duty to co-operate for the purpose of achieving compatible measures in respect of such stocks. This result was just as Chairman Satya Nandan mentioned:[171]

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[170] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, UN Doc. A/CONF.164/37, 8 September 1995.

[171] Statement of the Chairman, Ambassador Satya N. Nandan, on 4 August 1995, Upon the Adoption of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. UN Doc. A/CONF.164/35, 20 September 1995.

The conservation and management of straddling fish stocks and highly migratory fish stocks must, taking into account their biological unity, be the responsibility of all States concerned in a particular fishery. Improved standards for management are to be applied both within and beyond national jurisdiction. In respect of areas under national jurisdiction, there is an identifiable and accountable authority, that is, the coastal State. The responsibilities of the coastal State are clearly stated in the Convention [LOSC] and these have been further elaborated and reinforced in this Agreement in terms of better management standards and practices that are to be applied.

One of the cornerstones of the Agreement is the provision to ensure compatibility of conservation and management measures throughout the range of stocks. In this sense, the scope of the Agreement is broad enough to embrace resources as a whole, while fully respecting the different jurisdictional responsibilities. No one should escape from the conservation and management principles of the Agreement. [brackets added]

C. REMARKS

During the past decade, the management of high seas fisheries has appeared as a significant international problem. This results primarily from a state extending its jurisdiction over an enlarged maritime zone, which necessitates other states to shift or transfer their high seas fishing activities outside of the new jurisdiction. Nonetheless, those stocks which are caught in the high seas area could adversely impact the coastal state's conservation or management measures in its EEZ.

The UN Conference on the Straddling Fish Stocks and Highly Migratory Fish Stocks mainly dealt with this issue. The Agreement reached on 4 August 1995 is built on three main pillars:[172]

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[172] *Ibid.*

First, it sets out principles on which conservation and management of the stocks must be based and establishes that such management must be based on the precautionary approach and the best available scientific information.

The second pillar ensures that the conservation and management measures are adhered to and complied with, and that they are not undermined by those who fish for the stocks. For this purpose, the primary responsibility of the flag State is reaffirmed and the framework for action by States other than the flag States is set out with clear safeguards against abuse.

The third pillar is the provision for peaceful settlement of disputes. While providing for various possibilities of non-binding settlement, in the end result every dispute can be submitted to a court or tribunal for a binding decision.

6. OBSERVATIONS

The extension of fisheries jurisdiction over the past several decades is an important evolution in the law of the sea. In 1945 two Truman proclamations initiated this extension trend. Each coastal state had its own formula to extend its jurisdiction over marine resources. Nonetheless, the freedoms of the high seas, especially the high seas fisheries, are still respected by most of the countries until UNCLOS III.

Starting from the 1970's, a new jurisdiction area, the EEZ, was established and became a customary international law. In addition, some of the conditions, based on the conservation and management of fishery resources, were included in the provisions of high seas fisheries of the LOSC. This changed the nature of the freedom of high seas fisheries. Coastal states are conferred with certain rights to conserve and manage their marine resources and the distant water fishing states are obliged to abide by the regulations set by the coastal states in their EEZs.

At this stage, 'distance' is still the basic factor to measure the coastal states' jurisdiction, for instance, 200 nm of EEZ. Nonetheless, since the late 1980's, such jurisdiction has extended to fish species. In other words, 'distance' is not the only factor to measure jurisdiction over resources. Therefore, the issue of straddling and highly migratory species is raised. Along with this issue, the use of fishing gear became another consideration in the concept of freedom of high sea fisheries. Conservation and management, but not utilisation, are the prevalent considerations in making marine policy.

As for the issue of straddling and highly migratory species, it is understandable that coastal states want to extend their jurisdiction over certain species which migrate out of their EEZs because the reason of conserving and managing living resources. Without a co-ordinated management, fishing outside of a state's EEZ could prejudice both its conservation measures and the economic preferences accorded its fishermen within the zone.[173] It is still arguable, however, whether this approach towards the conservation and management of high seas living resources constitutes creeping jurisdiction. Some argue that such an approach prevents creeping jurisdiction, because "it is conceived within the framework of the Law of the Sea Convention, subject to perfecting the meaning and extent of some of its provisions."[174] On the contrary, to

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[173] Stevenson and Oxman, "The Future of the United Nations Convention on the Law of the Sea," 88 *AJIL* (1994) p. 497.

[174] Vicuña, *supra* note 140, pp. 423-424.

other scholars, such an approach is considered creeping jurisdiction. Professor Lagoni takes the opinion that the jurisdiction to the EEZ is not a case of territorial jurisdiction, but of functional jurisdiction. A state's extension of its law beyond 200 miles is against the package deal which forms the basis of the LOSC.[175]

In retrospect of the development of the law of the sea, from extending jurisdiction in terms of the distance, i.e. 12 nm territorial sea and 200 nm EEZ, to jurisdiction over certain species in the high seas, i.e. straddling and highly migratory species, it is apparent that not only the area of high seas will be diminished but also the freedom of fishing on the highs seas will be limited.

As a distant water fishing state, Taiwan had adjusted itself to the new climate in order not to lose any competitive advantage in fishery production. Nonetheless, not being recognised as a state,[176] Taiwan has encountered difficulties in dealing or negotiating with other states. We shall take a further look at the difficulties Taiwan has faced, how these difficulties affect fishery negotiations between Taiwan and other states, and how we can reduce or eliminate these difficulties in the following chapters.

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175 Lagoni, in Discussion, Miles and Treves, *supra* note 140, p. 453. Also see Ball, "The Old Grey *Mare*, National Enclosure of the Oceans," 27 *ODIL* (1996) pp. 106-108; Stevenson and Oxman, *supra* note 173, p. 498.

176 See *infra* Chapter 3.

PART II.

TAIWAN AND THE DISPUTES IN THE SOUTH CHINA SEA

The purpose of Part II is to examine the following two problems: the international status of Taiwan and the overlapping maritime claims in the South China Sea region. Due to the international non-recognition of the Republic of China (Taiwan), Taiwan is unable to negotiate with its neighbouring states, although it is one of the parties to the South China Sea conflicts. Furthermore, owing to the complicated political, economic, and jurisdictional conditions in this region, such conflicts cannot be solved in a simple way. Under such circumstances, a non-boundary-based and functional resolution is the most feasible method to solve the conflicts in the South China Sea. These matters will be discussed in the following chapters.

CHAPTER THREE

THE INTERNATIONAL STATUS OF TAIWAN

Taiwan is an island situated 124 miles off the eastern shores of Chinese mainland. Owing to its strategic location,[1] 725 miles south of Japan and 207 miles north of the Philippines, Taiwan used to play a key role in the Cold War period and was praised as an 'unsinkable aircraft carrier'[2] during the Korean War (1950-1953).

Taiwan's international legal status has been an issue since 1949. In December 1949, due to its defeat in civil war with the Chinese Communist Party (CCP), the government of the Republic of China (ROC) retreated to Taiwan whilst the CCP established the People's Republic of China (PRC). Since then, two Chinese regimes have existed, both of which claim to be the sole legal representative of the whole Chinese people and to be entitled to the territory of China.

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1 Shaw, "Modern History of Taiwan: An Interpretative Account," in Chiu, ed., *China and the Taiwan Issue* (1979) p. 7; Hsieh, *Taiwan - Ilha Formosa: A Geography in Perspective* (1964) pp. 7-8; Sih, *Taiwan in Modern Times* (1973) p. 1.

2 US General Douglas MacArthur stated during his visit to Taiwan on 31 July 1950. About Taiwan's strategic status in confronting Chinese communist in the 1950's, see Spanier, *The Truman-MacArthur Controversy and the Korean War* (1959), Chapters 3 and 4.

This chapter will examine the history of Taiwan and the issue of international recognition of Taiwan.

1. THE GEOGRAPHICAL FEATURES

The ROC is comprised of four divided groups of islands: Taiwan island, Penghu islands, Kinmen (Quemoy) islands, and Matsu islands.[3]<See Map 1>

Taiwan, the main and largest island, is a leaf-shaped island with a coastline over 1,566 km in length and situated on the margin of the Chinese continental shelf. Taiwan stretches about 386 km from north to south and 137 km across its widest points from east to west. The land area is about 36,000 km², about two thirds of which is covered with forested mountains and only one third made up of plains and small hills.

Penghu, also known by its Portuguese name 'Pescadores' ('fishermen'), is an archipelago of 64 small islands located in the Taiwan Strait off the west coast of Taiwan. The total area of these islands is 126.86 km². However, only twenty of them are inhabited. According to the Penghu County government, there are 54,766 fishermen in Penghu, which is about 55% of the population. Makung, the capital city, is 76 nm from Kaohsiung and 95 nm from Keelung.

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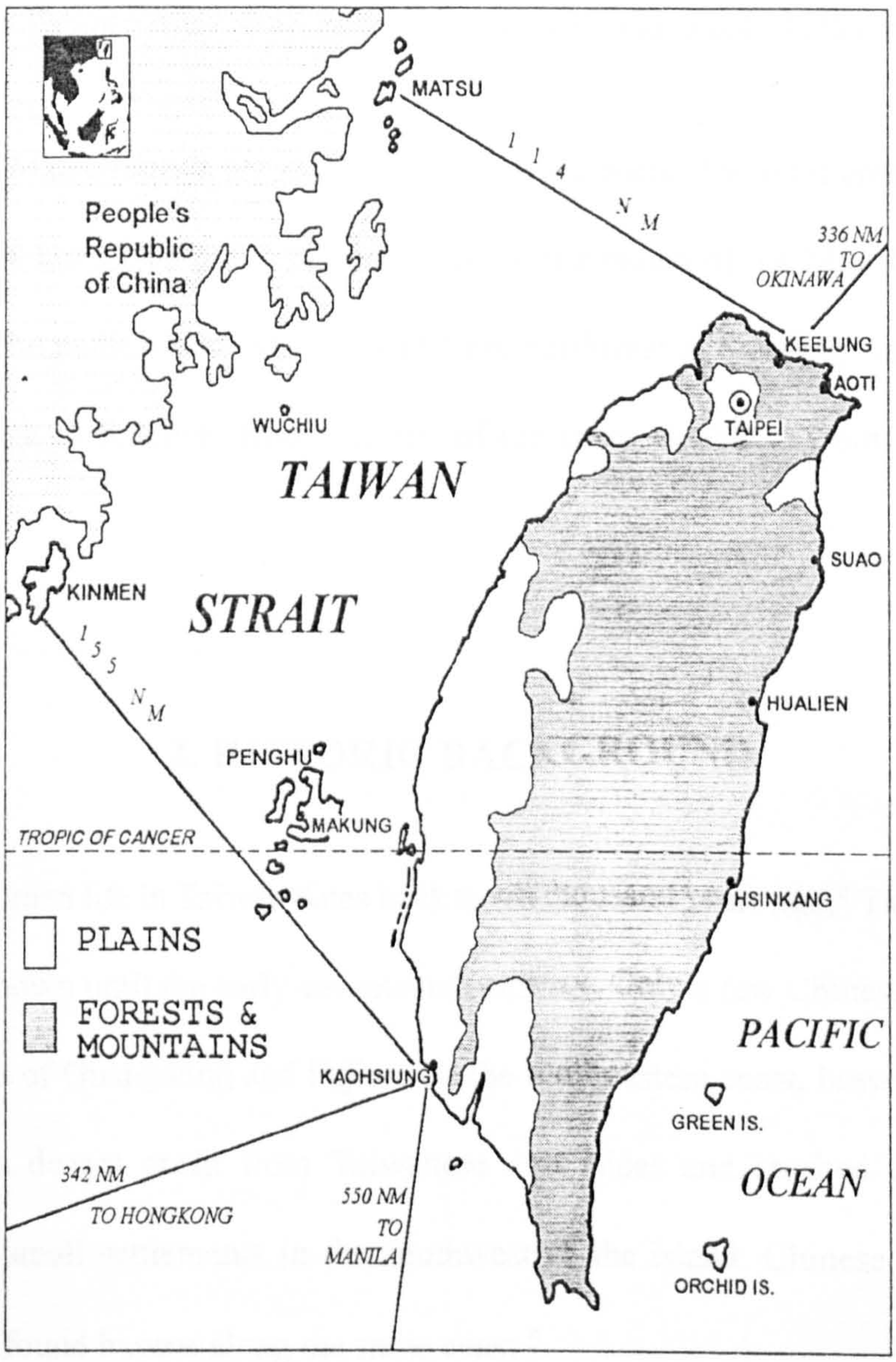
3 The following account on Taiwan and other islands is based on Sung, *Republic of China 1988: A Reference Book* (1989) pp. 162-194.

Map 1 Taiwan: Geographical Features



Source: Shen, Agricultural Development on Taiwan Since World War II (1964). Amended by the Author.

Kinmen (Quemoy) includes twelve islets, covering an area of 150.45 km² off the south-eastern coast of Chinese mainland. It controls the mouth of Amoy Bay. Kinmen is 82 nm west of the Penghu islands and 18 nm east of Amoy. It is 198 nm

from Keelung in northern Taiwan and 155 nm from Kaohsiung in southern Taiwan. The shortest distance from Kinmen to Chinese mainland is only 1.25 nm.

The Matsu Islands are made up of nineteen islets. The total area of the island group is 28.8 km². This group of islands lies at the mouth of the Min River, Chinese mainland. The main island, Matsu, is 114 nm northwest of Keelung, and is the same distance north of Kinmen. Kaoteng, one of the islets, is only 5.5 nm from Chinese mainland.

2. HISTORIC BACKGROUND

Although human life in Taiwan dates back to ten thousand years ago,[4] Taiwan was still largely unknown until the early seventeenth century. Only a few Chinese traders from the harbours of Guangdong and Fujien, on the southeastern coast, braved the dangers and made a decent profit from Taiwanese deer hides and crushed deerhorn, and established small settlements in the southwest of the island. Chinese and Japanese pirates also found havens along the same coast.[5]

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4 Only a few aborigines inhabited Taiwan at that time. Most anthropologists believe that the aborigines hail from Southeast Asia and are related to the present-day Malay people. See Copper, *Taiwan: Nation-State or Province?* (1990) p. 17; Davidson, *The Island of Formosa: Past and Present* (1977) pp. 2-4; Knapp, ed., *China's Island Frontier: Studies in the Historical Geography of Taiwan* (1980) Part I.

5 Spence, *The Search for Modern China* (1990) pp. 53-58.

In the 1620's Taiwan first began to feature in global politics and attracted the attention of European powers. It was the Portuguese who first explored the island and gave it the name 'Ilha Formosa', meaning 'Beautiful Island'. Then the Spaniards established a small base in the north at Keelung, and the Dutch came to establish a fort in 1624 in the south at Tainan. By the 1640's the Dutch had driven out both the Spaniards and the last Japanese pirates, and a profitable trade developed between the island, the Dutch Empire in the East Indies (now Indonesia), and the merchants and administrators on China's east coast.[6] In 1646, a Ming loyalist, Zheng Chenggong, fought the Dutch military and expelled them.[7]

By the 1850's, in the wake of a series of internal rebellions (White Lotus Rebellion,[8] the Taiping Revolution,[9] the Nien Rebellion,[10] and the Muslim Revolts[11])

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6 *Ibid.*, p. 54; Campell, *Formosa under the Dutch* (1903).

7 Spence, *supra* note 5, pp. 53-58.

8 For White Lotus Rebellion in 1770's, see *ibid.*, pp. 112-114, 165; Hsu, *The Rise of Modern China* (1990) pp. 128-129.

9 For the Taiping Revolution, see Spence, *supra* note 5, pp. 170-178; Hsu, *ibid.*, pp. 226-253; Gray, *Rebellions and Revolutions* (1990) pp. 52-76; Hsiang, et al., eds., *Taiping Tienkuo (The Taiping Heavenly Kingdom)* Vol. 2 (1952) p. 632; Teng, *New Light on the History of the Taiping Rebellion* (1950); Shen, "Hung Hsiu-chuan and the Taiping Revolution," 1 *Historical Research* (1963) pp. 49-94; Shih, *The Taiping Ideology: Its Source, Interpretations and Influences* (1967).

10 For the Nien Rebellion, see Spence, *ibid.*, pp. 184-188; Fan, et al., eds., *Nien-Chun (The Nien Army)* (1953); Teng, *The Nien Army and Their Guerrilla Warfare 1851-1868* (1961).

11 For the Muslim Revolts, see Pai, ed., *Hui-min chi-i (The Righteous Uprising of the Muslems)* (1953); Wang, *Hsien-Tung yun-nan hui-min shih-pien (The Yunnan Muslem Rebellion During the Hsien-feng and the Tung-chih Periods)* (1968); Spence, *ibid.*, pp. 189-193.

and the pressure of a rising population,[12] millions of Chinese chose to move northeast, first to the settled arable regions of Liaodong, Jilin and Heilongjiang (the northeastern area of China). Others braved the short sea passage to swell the number of immigrants on Taiwan, which had become thoroughly opened to Chinese settlement and agriculture by the 1850's and was named a full province in 1885.[13]

In 1895, following the defeat of China (the Ching Dynasty) in the war with Japan for the protection of Korea,[14] the Treaty of Shimonoseki was signed by both parties on 17 April 1895.[15] According to the Treaty, China recognised "the full and complete independence and autonomy of Korea," which under the circumstances, effectively made Korea a Japanese protectorate. Also, under the provision of Article II of the Shimonoseki Treaty,[16] it provided that

> China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon: ...
>
> (b) The island of Formosa, together with all islands appertaining or belonging to said island of Formosa...

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12 China's population had probably reached 430,000,000 by 1850, see Spence, *ibid.*, p. 210. Cf. Lo, "The Question of Population Pressure in the Pre-Taiping Revolution Years," 8 *Collected Writings on Chinese Society and Economics, Academia Sinica* (1939) pp. 20-80.

13 Spence, *ibid.*

14 Hsu, *supra* note 8, pp. 332-341.

15 Treaty of Peace between Japan and China, 1895 (Treaty of Shimonoseki). Text reprinted in MacMurray, ed., *Treaties and Agreements With and Concerning China, 1894-1919* (1921) pp. 18-25. About the settlement of Shimonoseki Treaty, see Cheng, ed., *Chung-Kuo nei-luan wai-huo li-shih tsung-shu (A Historical Series on China's Internal Disorder and External Trouble)* Vol. 5 (1936).

16 MacMurray, *ibid.*, p. 19.

Therefore, Taiwan, the Pescadores, as well as the Liaodong region of southern Manchuria were ceded to Japan, and four more treaty ports[17] were opened to Japan. From then, Taiwan was under Japanese occupation for fifty years till the end of the Second World War.

Under the lead of Dr. Sun Yat-Sen, the Ching Dynasty was overthrown in 1912 and the ROC was established.[18] Nonetheless, the foray from Japan did not cease. Japan continued to extend its hold over Manchuria and even created a puppet regime, Manchukuo, there.[19] The Japanese invasion of Chinese territory inevitably resulted in the Sino-Japanese War (1937-1945).

During the Second World War, two important documents concerning Taiwan were drawn up. Both of these documents are important for the latter discussion of Taiwan's legal status. On 1 December 1943, Chinese General Chiang Kai-Shek,

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17 Those ports are Shahshih, Chungking, Suchow, and Hangchow. See MacMurray, *ibid.*, p. 20. In the treaty ports, Japanese residents were under their consul's legal jurisdiction, i.e. they had the rights of extraterritoriality. See Fairbank and Reischauer, *China: Tradition and Transformation* (1979) pp. 283-289.

18 For the establishment of the ROC, see Hsieh, *Chinese Historiography on the Revolution of 1911* (1975); Cantlie and Jones, *Sun Yat-sen and the Awakening of China* (1912).

19 For the Manchukuo, see Lattimore, *Manchuria, Cradle of Conflict* (1932); Merley, ed., *The China Quagmire: Japan's Expansion on the Asian Continent 1933-1941* (1983); Ogata, *Defiance in Manchuria: the Making of Japanese Foreign Policy: 1931-1932* (1964); Shen, *Japan in Manchuria: An Analytical Study of Treaties and Documents* (1960); Smith, *The Manchurian Crisis: 1931-1932* (1948); Thorne, *The Limits of Foreign Policy: The West, the League and the Far Eastern Crisis of 1931-1932* (1972); Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935).

British Prime Minister Winston Churchill, and US President Franklin D. Roosevelt met in Cairo, and issued a Declaration which said:[20]

> It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China.

The second document is the Potsdam Proclamation. On 26 July 1945, Chiang, Churchill, and Roosevelt made a proclamation[21] which affirmed that

> The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determined.

The Second World War in the east ended when Japan surrendered on 14 August 1945. The Instrument of Surrender was signed on board the U.S.S. Missouri in Tokyo Bay by the Japanese Foreign Minister Shigemitsu and General Yoshijiro Umezu on 2 September 1945.[22] Simultaneously, in accordance with the General Order No. 1, issued by the Office of the Supreme Commander for the Allied Powers, the Japanese forces within China and Taiwan surrendered to General Chiang Kai-Shek.[23] On 25 October 1945, the ROC government accepted Japan's surrender at Taipei and placed the people, territory, and administration of Taiwan and Penghu under the

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20 The Cairo Declaration, *US Department of State Bulletin,* Vol. IX, No. 232 (4 December 1943) p. 393.

21 Paragraph (8) of the Potsdam Proclamation. See Whiteman, *Digest of International Law*, Vol. 3 (1964) p. 484.

22 *Ibid.*, pp. 486-487.

23 *Ibid.*, pp. 487-488.

sovereignty of the ROC.[24] From the next day, Taiwan was administrated as a province of the ROC.[25]

The Sino-Japanese War was over, but the civil war between the Kuomintang (KMT, also known as the Chinese Nationalist Party), the ruling party of the Chinese government, led by Chiang Kai-Shek, and the CCP, led by Mao Tse-Tung, was still under way.[26] Due to the eight-year war with Japan, which completely exhausted the government militarily, financially, and spiritually, the KMT government forces simply collapsed.[27]

By 1 October 1949, the CCP controlled most of the Chinese mainland, and the government of the PRC proclaimed itself the central government of China. On 8 December 1949, the government of the ROC moved to Taiwan and established its capital at Taipei.[28] The establishment of the PRC was recognised by the Eastern

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24 Chiu, ed., *China and the Question of Taiwan: Documents and Analysis* (1973) pp. 211-213.

25 Lien, *President Chiang and the Recovery of Taiwan* (1967) p. 82.

26 Hsu, *supra* note 8, pp. 630-633; Chen, *Mao and the Chinese Revolution* (1965); Kwei, *The Kuomintang-Communist Struggle in China, 1922-1949* (1971); Loh, *The Kuomintang Debacle of 1949: Conquest or Collapse?* (1965); Pepper, *Civil War in China: The Political Struggle, 1945-1949* (1978); *United States Relations with China, with Special Reference to the Period 1944-1949* (1949).

27 Hsu, *ibid.*, pp. 639-643.

28 Eastman, Chen, Pepper, and Van Slyke, *The Nationalist Era in China 1927-1949* (1991) pp. 352-353.

European communist countries,[29] such as the Union of Soviet Socialist Republics (USSR), immediately.[30]

Therefore, since 1 October 1949, there have been two Chinese governments. The government of the ROC claimed its sovereignty over Taiwan on the basis of the Cairo Declaration and the Potsdam Proclamation, in the light of its having taken over the island from Japan in 1945. It also maintains the ROC Constitution and its original government structure. Hence, its sovereignty is over the whole Chinese mainland as well as Taiwan, and it is still the legitimate Chinese government. On the other hand, the PRC government argues that it controls the enormous Chinese mainland and the majority of the population. Hence, it is the government of all of China, with Taiwan being a part of its domain which is now under the control of rebels.

Both the Chinese governments claim a 'One China Policy', under which there is only one China and Taiwan is a part of China.[31] Therefore, the ROC government and

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29 By the end of 1949, there were thirteen countries which recognised the PRC. They are Albania, Bulgaria, Burma, Czechoslovakia, East Germany, Hungary, India, Poland, Romania, Soviet Union, North Korea, Mongolia, and Yugoslavia. See *Zhong-kuo Bai-ke Nien-Chien: 1992 (Yearbook of Chinese Encyclopaedia: 1992)* (1993).

30 'Telegram from Mr. Gromyko, Russian Deputy Minister of Foreign Affairs, to Chou En-Lai, Foreign Minister of the People's Republic of China, Announcing the Recognition of the Central People's Government by the Government of the USSR, 2 October 1949.' See Carlyle, ed., *Documents on International Affairs 1949-1950* (1953) pp. 539-541. On the same day, the USSR terminated relations with the ROC.

31 Brenhardt, ed., *Encyclopaedia of Public International Law,* Vol. 10 (1987) p. 127. Also, Wright, "The Chinese Recognition Problems," in Gross, ed. *International Law in Twentieth Century* (1969) p. 605.

the PRC government have jointly created a new topic of study in international law -- 'One China, Two Governments'. That is to say, within the state of one China there are two separate regimes, one in the Chinese mainland and the other in Taiwan. They reject any suggestion or chance which could possibly lead to the creation of two Chinas. Doubtless, such a policy produces a disadvantageous situation for the ROC, because the PRC controls most of the resources, that is the population and the territory. Paradoxically, the ROC cannot abandon its One China Policy, because the PRC declared that force would be used against Taiwan if it were to declare itself to be a separate state. During the mid-1980's, the Chinese leader Deng Xiaoping expressed that China would employ force to unify the country under the following circumstances:[32]

> If Taipei leaned toward Moscow instead of Washington; if Taipei decided to build nuclear weapons; if Taipei claimed to be an independent state; if Taipei lost internal control as a result of the succession process; or if Taipei continued to reject reunification talks for a long period of time.

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32 See Huan, "Taiwan: A View from Beijing," 63(5) *Foreign Affairs* (1985) p. 1068; *The New York Times* (12 October 1984) p. A8. Also, a high-ranking Chinese Communist Politburo member Li Rui-Huan said that "the PRC won't budge an inch on its one China policy and will take all possible means to prevent the independence of Taiwan." *Foreign Broadcast Information Service, China,* 30 October 1992, p. 47. Cited from Chiu, *The International Legal Status of the Republic of China,* revised version (1992) p. 8. In another more recent example, Chinese President and Communist Party General Secretary, Jiang Zemin, states '[O]ne thing we are certain: If separatism emerges on Taiwan, whether stemming from international hostile forces or from local separatist forces, then we might use non-peaceful means to achieve reunification.' See *U.S. News & World Report* (23 October 1995).

3. DIPLOMATIC WARFARE BETWEEN TWO CHINESE GOVERNMENTS

3.1. TAIWAN: STATUS UNDETERMINED?

Although the Second World War ended in 1945, the Treaty of Peace between the Allied Powers and Japan was not signed until 8 September 1951 in San Francisco.[33] China was not invited to be a party to the Peace Treaty. The reason was that opinions were seriously divided about which Chinese government could represent China.[34] The Office of Public Affairs of the US Department of State in September 1951, in a pamphlet entitled 'Background of Japanese Peace Conference, San Francisco, September 1951' presented the situation as follows:[35]

> China was not invited for a reason as practical as it was obvious. Roughly half of the participating countries would not agree to sign any treaty at the same table with the National Government, the Republic of China. The other half, including the United States, would not sign with the Chinese Communist regime.

Due to the international political situation, particularly the outbreak of the Korean War, in which the PRC sent troops to aid North Korean Communists, the

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33 136 *UNTS* 48.

34 The US initially planned to invite the ROC to the peace conference, but the UK and other countries which recognised the PRC objected to this suggestion. See *The Relationship between the San Francisco Peace Treaty and the Sino-Japanese Peace Treaty* (1966) pp. 76-82; Chiu, *supra* note 24, pp. 124-126.

35 *The New York Herald Tribune* (28 September 1951).

Peace Treaty between the ROC and Japan[36] was signed at Taipei on 28 April 1952.

Regarding the question of Taiwan, Article 2 of the Sino-Japanese Peace Treaty states:

> It is recognised that under Article 2 of the Treaty of Peace with Japan[37] signed at the city of San Francisco in the United States of America on September 8, 1951, Japan has renounced all right, title and claim to Formosa and the Pescadores as well as the Spratly Islands and the Paracel Islands.

The argument, that Taiwan's status is undetermined, is based on the 'cession' provision in the aforementioned two Peace Treaties. It is argued that the status of Taiwan is undetermined, because in two peace treaties Japan just renounced its title and claim to Taiwan and Penghu but without specifying the recipient. Thus the Peace Treaties left sovereignty over Taiwan undetermined.[38] The US Secretary of State Dulles observed that[39]

> [T]echnical sovereignty over Formosa and the Pescadores has never been settled ... [T]he future title is not determined by the Japanese peace treaty, nor is it determined by the peace treaty which was concluded between the Republic of China and Japan.

The UK government took a similar position on this issue,[40]

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36 138 *UNTS* 38; Also, *Treaty between the Republic of China and Foreign States (1927-1957)* (1958) pp. 248, 250.

37 With respect to the issue of Taiwan, Article 2, Paragraph (b) of the 1951 Peace Treaty stipulates that "Japan renounces all right, title and claim to Formosa and the Pescadores." *Supra* note 33.

38 Crawford, *The Creation of States in International Law* (1979) p. 149; Jain, "The Legal Status of Formosa," 57 *AJIL* (1963) pp. 25-26; O'Connell, "The Status of Formosa and the Chinese Recognition Problem," 50 *AJIL* (1956) pp. 409-413; Wright, "The Status of Communist China," 11 *J. Int'l Affairs* (1957) p. 181; *idem*, "Non-Recognition of China and International Tensions," 34 *Current History* (1958) p. 153.

39 31 *Department of State Bulletin* (1954) p. 896.

40 HC Debs., vol. 536, Written Answers, col. 159: 4 February 1955.

Under the Peace Treaty of April, 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the *de jure* sovereignty over which is uncertain or undetermined.

However, the ROC government contests that view and draws different conclusions concerning the legal status of Taiwan from the Peace Treaties. According to the first paragraph of the Instrument of Surrender,[41]

> The Japanese Government, and the Japanese Imperial General Headquarters, hereby accept the provisions in the declaration issued by the heads of Governments of the United States, China, and Great Britain on July 26, 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

Obviously, nothing was mentioned about Taiwan, but it states that Japan accepted the provisions of the Potsdam Proclamation which itself refers to the terms of the Cairo Declaration, which did declare that Taiwan and the Pescadores would be restored to China.

Nonetheless, some may argue that the Cairo Declaration and the Potsdam Proclamation are only binding on those signature states, that is, China, France, the Soviet Union, the UK, and the US. "[T]hey could hardly comprise transactions out of which follow rights and duties of other states."[42] The ROC government holds that those documents, the Cairo Declaration and the Potsdam Proclamation, are not only

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41 Whiteman, *supra* note 21, pp. 486-487.

42 Lauterpacht, ed., *Oppenheim's International Law: A Treatise,* Vol. 1, 7th Edition (1952) pp. 872-873.

binding on the signatories, but are also binding upon Japan once it accepted the provisions of the Potsdam Proclamation subject to the Instrument of Surrender.[43]

Furthermore, Articles 4 and 10 of the Sino-Japanese Peace Treaty provide:

> Article 4
> It is recognised that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war.
>
> Article 10
> For the purpose of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores); and juridical persons of the Republic of China shall be deemed to include all those registered under the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).

Hence, although there is no clear reference as to who will be the recipient, it is clear from these articles, especially Article 4, that the 1895 Treaty of Shimonoseki[44] naturally became null and void. Therefore China reacquired its sovereignty over Taiwan, Penghu, and other related islands. Furthermore, Article 10 also implies that Taiwan and Penghu are under the sovereignty of the ROC.

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43 Ministry of Foreign Affairs, ROC, News Conference of 16 October 1959.

44 *Supra* note 15.

Some international scholars justify the ROC's sovereignty on Taiwan with the principle of occupation in international law. Arthur Dean argued[45]

> From the standpoint of customary international law, at least, no cession is required. Nationalist China (ROC) may have already acquired legal title to Formosa and the Pescadores by occupation or possibly by subjugation.

D. P. O'Connell holds the opinion that[46]

> [T]he dereliction of the territories by Japan without provision for their ultimate disposition ... left them available for appropriation by the nations competent to manifest their sovereignty over them. From this view it follows that the belligerent occupants, namely ... China in Formosa and the Pescadores, acquired sovereignty in the moment when Japanese dereliction terminated their status as belligerent occupants.

In addition, it is a fact that the ROC government has effectively occupied and controlled Taiwan and Penghu since 25 October 1945; such occupation clearly indicates an intention and will to act as a sovereign.[47] It may be fair to say that the ROC had already acquired legal title to Taiwan and Penghu, although no cession provisions are clearly made in the Peace Treaty.

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45 Dean, "International Law and Current Problems in the Far East," *AJIL Proceedings* (1955) pp. 86, 95-96.

46 O'Connell, *International Law*, Vol. 1, 2nd Edition (1970) p. 448. Cf. Morello, *The International Legal Status of Formosa* (1966) p. 92.

47 The PCIJ pointed out in the *Legal Status of Eastern Greenland* Case that acquisition of title by occupation involves 'the intention and will to act as sovereign and some actual exercise or display of such authority.'

3.2. CHINESE REPRESENTATION IN THE UNITED NATIONS

The UN is probably the most important international organisation in the world. The main purpose of the UN itself is of a political character: the maintenance of international peace and security, an endeavour which obviously can be realised first of all by the prevention and removal of threats to the peace, the settlement of international disputes by peaceful means, the development of friendly relations among nations, and the achievement of international co-operation in solving international problems.[48] It is deeply involved with world affairs and its functions covers almost all international activities. For this reason, Chinese representation in the UN inevitably became a bone of contention between the two Chinese governments.

After the establishment of the PRC, on 18 November 1949, its Foreign Minister Chou En-Lai sent statements to the President of the General Assembly and the Secretary-General stating that the delegation appointed by the Nationalist government had no authority to speak for the Chinese people.[49] The General Assembly was in session at the time but the credentials of the Chinese representatives had already been approved, and no action was taken.[50] Following the PRC's statement, the Soviet

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48 Charter of the United Nations, Article 1; Also see Bailey, *The Procedure of the UN Security Council,* 2nd Edition (1988); Bokor-Szego, *The Role of the Untied Nations in International Legislation* (1978); Roberts and Kingsbury, eds., *United Nations, Divided World: the UN's Roles in International Relations* (1993); Cassese, ed., *UN Peace-Keeping* (1978); Nicholas, *The United Nations as a Political Institution* (1971); Gutteridge, *The UN in a Changing World* (1969).

49 UN Doc. A/1123, 21 November 1949.

50 Bailey, *supra* note 48, p. 150.

representative raised the question of Chinese representation at a meeting of the Security Council held on 29 December 1949. He said he supported the Chinese government and the Soviet government would not regard the KMT representative as being empowered to represent the Chinese people.[51]

On 8 January 1950, Chou En-Lai sent another note to the Secretary-General as well as one to the members of the Security Council, protesting at the Council's failure "to expel the illegitimate representative of the Chinese Kuomintang reactionary clique." On 10 January, with the representative of the ROC in the chair, the Soviet representative repeated his opposition to the presence in the Council of a representative of the ROC, and formally proposed that his credentials be not recognised and that he be excluded from the Council. The President put his ruling to the vote, and it was upheld by eight votes to two (Soviet Union and Yugoslavia), with India abstaining. The Soviet representative declared that he could not participate in the work of the Council or take part in the meeting until the KMT representative was excluded, then he left the Council chamber and commenced a boycott.[52]

On 25 June 1950, the Korean War broke out when a force of North Korean troops crossed the 38° north latitude and invaded South Korea. In the absence of the Soviet Union, the other members of the UN Security Council acted swiftly to condemn the North Koreans and to urge UN members to give necessary assistance to stabilise

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51 *SCOR*, 4th year, 458th meeting, 29 December 1949, pp. 1-3.

52 Bailey, *supra* note 48, pp. 150-151.

the situation in the Korean Peninsula.[53] Also, the US President Truman ordered the US Seventh Fleet to patrol the Taiwan Strait, which meant that the PRC could not invade Taiwan even if it was ready to do so.[54]

The Soviet representative did not resume participation in the Security Council until it was his turn to preside over meetings of the Council in August 1950.[55] Since then, the Soviet representative has raised the question of Chinese representation on four subsequent occasions: 10 November 1951,[56] 31 January 1955,[57] 8 September 1955,[58] and 24 May 1967.[59]

The question of Chinese representation was also raised in the General Assembly. Cuba first raised the matter in the General Assembly in 1950, and the Assembly adopted an inconclusive resolution.[60] Between 1951 and 1953, the Assembly decided to postpone consideration of proposals on Chinese

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53 UN Security Council, Resolution 82(S/1501), 25 June 1950; Bailey, *supra* note 48, p. 245.

54 "President Truman's Statement on the Mission of the U.S. Seventh Fleet in the Formosa Area, June 27, 1950" in *American Foreign Policy, 1950-1955, Basic Documents,* Vol. 2 (1957) p. 2468.

55 Bailey, *supra* note 48, p. 154.

56 *SCOR*, 6th year, 566th meeting, 10 November 1951, para. 1.

57 *SCOR*, 10th year, 689th meeting, 31 January 1955, paras 1-27.

58 *SCOR*, 10th year, 700th meeting, 8 September 1955, paras. 1-5.

59 *SCOR*, 22nd year, 1341st meeting, 24 May 1967, paras. 8-59.

60 UN Resolution 490(V), 19 September 1950.

representation,[61] and between 1954 and 1960 decided 'not to consider' such proposals on numerous occasions.[62] From 1961-1970, the Assembly considered proposals to seat the PRC, on seven occasions (1961 and 1965-1970), voting also that any proposal to change the Chinese representation would be 'important', within the meaning of Article 18 of the Charter, thus requiring a two-thirds majority. In 1966, 1967, and 1968, the Assembly rejected proposals to set up committees to study the question.[63]

<Figure 1> indicates the change in voting patterns on the representation of China in the General Assembly. As we can see, the support for the PRC had increased steadily. In contrast, the ROC did not get constant support during the 1950's and 1960's. Although its support did rise considerably between 1960 and 1968, this situation did not last long. From 1968, the support for the ROC declined, leading to its eventual defeat on the question of representation in 1971.

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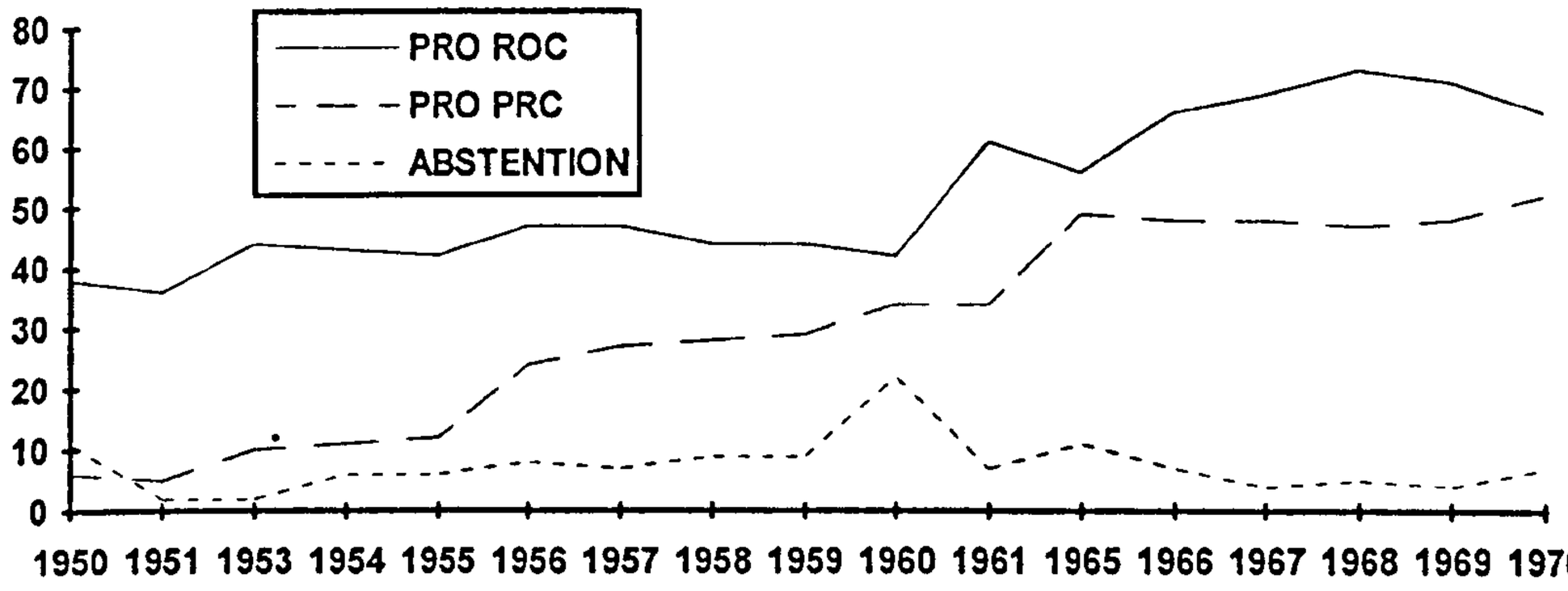
61 UN Resolution 501(V), 5 November 1951; UN Resolution 800(VIII), 15 September 1953.

62 UN Resolution 903(IX), 21 September 1954; UN Resolution 990(X), 20 September 1955; UN Resolution 1108(XI), 16 November 1956; UN Resolution 1135(XII), 24 September 1957; UN Resolution 1239(XIII), 23 September 1958; UN Resolution 1351(XIV), 22 September 1959; UN Resolution 1493(XV), 8 October 1960.

63 UN Resolution 1668(XVI), 15 December 1961; UN Resolution 2025(XX), 17 November 1965; UN Resolution 2159(XXI), 29 November 1966; UN Resolution 2271(XXII), 28 November 1967; UN Resolution 2389(XXIII), 19 November 1968; UN Resolution 2500(XXIV), 11 November 1969; UN Resolution 2642(XXV), 20 November 1970. Also Bailey, *supra* note 48, pp. 150-155.

Figure 1 United Nations General Assembly Voting on the Issue of Representation of China



Source: Djonovich, ed., *United Nations Resolutions* (Oceana Publications, Inc.: Debbs Ferry, New York, 1990).

In 1971, when the situation in the General Assembly was unfavourable to the ROC, the US proposed a draft resolution providing for the Dual Representation of China in the UN.[64] That draft resolution stated that

1. [T]he UN should take cognisance of the existence of both the People's Republic of China and the Republic of China ... [I]t should not be required to take a position on the respective conflicting claims ... pending a peaceful reconciliation of the matter as called for by the Charter.
2. Thus the People's Republic of China should be represented and at the same time provision should be made that the Republic of China is not deprived of its representation. [brackets added]

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64 UN. Doc. A/8442; 10 *ILM* (1971) p. 1100.

This could have been a turning point for the ROC to maintain its membership in the UN. However, the draft resolution was not put to the vote,[65] because both Chinese governments rejected any possibility which could create two Chinas.

On 25 October 1971, the General Assembly of the UN adopted a resolution, Resolution 2758(XXVI),[66] by 76 votes to 35 with 17 abstentions, which read

> The General Assembly,
>
> Recalling the principles of the Charter of the United Nations,
>
> Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter,
>
> Recognising that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,
>
> Decides to restore all its rights to the People's Republic of China and to recognise the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-Shek from the place which they unlawfully occupy at the United Nations and in all the organisations related to it.

Consequently, the ROC representatives were expelled from the UN and the related specialised organisations.[67] From that time, the PRC took the Chinese seat in the UN, including permanent membership of the Security Council.

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65 11 *ILM* (1972) pp. 561-573.

66 *Yearbook of the United Nations: 1971,* Vol. 25 (1973) pp. 126-137; also Remz, comp., *Annual Review of United Nations Affairs, 1971-1972* (1973) p. 54.

67 See Chiu, Chen, and Lee, "Contemporary Practices and Judicial Decisions of the Republic of China Relating to International Law [1979-1981]" 1 *CYILA* (1981) pp. 142-143; also 11 *ILM* (1972) pp. 561-562; 12 *ILM* (1973) pp. 1526-1527; 20 *ILM* (1981) pp. 774-781.

3.3. RECOGNITION BY STATES

According to the PRC, the ROC government which was ruled by the KMT, had been overthrown by the Chinese people and sovereignty had been transferred to the PRC government. The ROC, either as a state or as a government, has not existed since 1949. Consequently, recognition can only be conferred upon the PRC. Following this logic, the PRC has tried to establish official diplomatic relations with other states, and at the same time it has asked states to terminate their diplomatic relations with the ROC.

To illustrate this situation, it is worth looking at the procedure whereby diplomatic relations were established between France and the PRC. In October 1963, General de Gaulle sent a special mission to China to discuss the subject of establishing diplomatic relations. On 27 January 1964, France and the PRC announced that they would establish diplomatic relations, with ambassadors to be exchanged over the following three months. The ROC embassy filed a strong protest over this unfriendly act, but did not sever diplomatic relations. However, under strong pressure from the PRC, it is reported that France urged the ROC to withdraw its embassy voluntarily, otherwise the latter would face expulsion from France. Having no other choice, the ROC terminated diplomatic relations with France on 10 February 1964.[68]

Under such circumstances, the diplomatic competition between the ROC and the PRC is a zero-sum game; none of the states can grant recognition to both

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68 Cohen and Chiu, *People's China and International Law: A Documentary Study,* Vol. 1 (1974) pp. 237-239. Also, see Shen, "The Taiwan Issue in Peking's Foreign Relations in the 1970's: A Systematic Review," 1 *CYILA* (1982) pp. 77-78.

governments. Due to the 'One China Policy', the ROC has great difficulty in combating the PRC, because the PRC occupies the territory, which is synonymous with 'China' in traditional thinking, exercising jurisdiction and control over its vast population.

Another important point is, as D. P. O'Connell pointed out, that a government is only recognised for what it claims to be.[69] With a small land area of an island and comparatively small population, Taiwan is hardly in a position to persuade other states to recognise the ROC in Taiwan as the representative of whole China.[70] Furthermore, as the PRC replaced the ROC as one of the five permanent members of the Security Council in 1971, the PRC holds far greater international political power, and has much greater influence in international affairs. Moreover, as far as international relations in the 1970's and 1980's are concerned, following the *détente* between Eastern and Western (or Communist and Democratic) countries, Taiwan's strategic importance was fading. All these advantages helped the PRC persuade states to recognise it as the sole Chinese government.[71]

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69 O'Connell, *supra* note 38, p. 415.

70 Because the ROC government never seeks recognition as 'Taiwanese Government'. In the ROC constitution, Taiwan is administratively categorised as a province.

71 This may be compared with the situation of succession between Russia and the Soviet Union. Because there were a variety of crucial arms control and disarmament treaties with the Soviet Union, the Western states were willing to take the view that there was a continuity of statehood between Russia and the Soviet Union, and, with the agreement of the Commonwealth States, agreed that Russia took the Soviet Union's seat in the UN. See Warbrick, "Current Development: Public International Law," 41 *ICLQ* (1992) p. 481; Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union," 4 *EJIL* (1993) pp. 58-60.

Theoretically, a state is free to decide whether it wants to accord recognition to another state in accordance with international law. There is no centralised authority to prescribe what states should do or should not do. Besides, international law is a decentralised legal system, thus the accordance of recognition ultimately depends on a state's discretion.[72] In international practice, a state's decision to recognise another state is treated as a matter of policy and is exercised in order to protect its own national interest. Thus, recognition of states becomes a political function of the executive department of a government. In other words, during the process of making foreign policy, political considerations are of greater importance than theoretical ones.[73]

As we can see, the decision of a state to recognise an entity as a state is a highly political issue and it is natural for a state to pursue its own national interests. This helps explain why the number of states recognising the ROC has continued to decrease since it withdrew from the UN. As of 23 May 1972, 50 countries had diplomatic relations with the ROC and 71 had established or had announced establishment of diplomatic

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72 O'Connell, *supra* note 46, p. 132.

73 Brierly, *The Law of Nations,* 6th Edition (1963) p. 140; Brownlie, *Principles of Public International Law*, 4th Edition (1990) p. 92; *Idem*, "Recognition in Theory and Practice," 53 *BYIL* (1982) p. 201; Lauterpacht, ed., *Hersch Lauterpacht's International Law,* Vol. 1 (1970) pp. 323-324; Jennings and Watts, eds., *Oppenheim's International Law*, Vol. 1, Parts 2 to 4, 9th Edition (1992) pp. 132-133. Also see *infra* page 99 about the recognition of newly independent states from Yugoslavia.

relations with the PRC. There are now only 29 countries with formal diplomatic relations with the ROC[74] and 147 countries with the PRC.[75]

Following the ROC's withdrawal from the UN and the decrease in the number of states recognising the ROC, a question arises: If, let us suppose, there is no state which recognises the ROC, is the ROC still a state? What is its international personality? Relating to this question, it is necessary to examine recognition theory in international law.

4. IS TAIWAN A STATE? - A VIEW FROM INTERNATIONAL LAW

As explained, the ROC is not recognised as a state by most countries, nor is it a member state of the UN. Nonetheless, the ROC provides the effective government of the state which is based in Taiwan. What, if any, is the ROC's international status? We shall look at this issue from the international law perspective and international lawyers' opinions in the following sections.

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74 They are Bahamas, Belize, Centrafricaine (Central African Republic), Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guinea-Bissau, Haiti, Holy See, Honduras, Lesotho, Liberia, Malawi, Nauru, Nicaragua, Niger, Panama, Paraguay, Saint Christopher and Nevis, Saint Lucia, St. Vincent & Grenadines, Solomon Islands, South Africa, Swaziland, Tonga, and Tuvalu. See 11 *CYILA* (1991-92). As for relations between other states and Taiwan, Taiwan maintains good relations, although not official, with them. See *infra* note 99 and the accompanying text.

75 *Zhong-kuo Bai-ke Nien-Chien: 1992, supra* note 29.

4.1. RECOGNITION CRITERIA

The traditional 'requirements' of statehood, the criteria of a state's characteristics,[76] are enumerated in the 1933 Montevideo Convention on the Rights and Duties of States:[77]

> Article 1
> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a Government; and (d) a capacity to enter into relations with other States.

These criteria will be discussed as follows:

(A) population: There are no requirements for the size of the population,[78] but obviously it must be a permanent population. This criterion is intended to be used in association with that of territory, and connotes a stable community. Evidentially it is important, since in the absence of the physical basis for an organised community, it will be difficult to establish the existence of a state.[79] The population of 21,715,000 inhabitants on Taiwan is stable with an annual growth rate of 2.17% in 1993 and there is no meaningful migration or other movement of people into or out of Taiwan.[80]

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[76] However, the requirements in the 1933 Montevideo Convention illustrate a basic list for recognition criteria. New requirements are produced in different situations and in different cases. Cf. Those requirements mentioned in the "Guidelines on Recognition of New States in Eastern Europe and the Soviet Union by the EC member states". See *infra* note 103-106 and the accompanying text.

[77] *LNTS*, Vol. 165, p. 19.

[78] Crawford, *supra* note 38, p. 40. Actually, there are many micro states with little population are recognised by other states. Such as Andorra with population of 63,930, Liechtenstein with population of 30,281, and Monaco with population of 31,278. See *CIA World Factbook*, at gopher://hoshi.cic.sfu.ca:70/00/dlam/cia/all.

[79] Brownlie, *supra* note 73, p. 73; Crawford, *supra* note 38, p. 40.

[80] *Taiwan Statistical Data Book: 1993.*

(B) Defined territory: There must be a reasonably stable political community and this must be in control of a certain area, no matter the size of the area. It is clear from past practice that the existence of fully defined frontiers is not required and that what matters is the effective establishment of a political community.[81] Some may argue that the ROC government's claim to mainland China, which is not under its control, would give the ROC no defined territory. However, the ROC's loss of control of mainland China can be considered the loss of part of its territory due to civil war.[82] Moreover, after 1945, the ROC government has effectively controlled Taiwan, Penghu Islands, Kinmen Islands, and Matsu Islands, with a land area of 35,981 km^2,[83] for forty-six years. It can therefore be considered that the ROC maintains a stable and defined territory. As Jessup stated,[84]

> One does not find in the general classic treatment of the subject any insistence that the territory of a state must be exactly fixed by definite frontiers. We all know that historically, many states have long begun their existence ... Both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of the territory. The reason for the rule that one of the necessary attributes of a state is that it shall possess territory: one cannot contemplate a state as a kind of disembodied spirit.

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81 For example, Israel is accepted by the majority of nations as well as was admitted to the UN in spite of dispute over its borders. Brownlie, *supra* note 73, p. 73; Whiteman, *supra* note 21, Vol. 1, pp. 230-231. Cf. *North Sea Continental Shelf* Cases, p. 33.

82 *Supra* notes 26-28, and the accompanying text.

83 *The New Encyclopaedia Britannica,* Vol. 17, 15th Edition (1982) p. 995.

84 Friedman, et al, *Cases and Materials in International Law* (1969) pp. 155-156. Cf. The Unification of the German Democratic Republic and the Federal Republic of Germany in August 1990. See Treaty on the Establishment of German Unity, 31 August 1990, in 30 *ILM* (1991) p. 498.

However, it is still an argument that Taiwan's international legal status relating to its authority over the territory. In view of this, the ROC government has adopted a pragmatic measure to demonstrate Taiwan's practical jurisdiction. This can be seen from the following example:

> In view of its rapidly growing economy, the ROC felt its standing would be damaged if it did not join General Agreement on Tariffs and Trade (GATT). On 1 January 1990, Taiwan officially notified the Director-General of the GATT of its decision to accede to the GATT.[85]

In fact, the ROC government, on behalf of China, signed the GATT on 30 October 1947 and deposited its Instrument of Acceptance of Provisional Application of the GATT on 21 April 1948, and became one of the 23 original contracting parties to the GATT on 7 May 1948.[86] After the ROC government moved to Taiwan in 1949, it found that it would be impossible to continue the rights and obligations under the GATT and it notified the Secretary-General of the UN of its decision to withdraw from GATT membership on 6 March 1950.[87]

There are three methods by which a government can be a contracting party to the GATT, namely original membership, accession under Article XXXIII, and

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85 'Memorandum on Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu Submitted by the Republic of China to the General Agreement on Tarrifs and Trade, January 1, 1990.' in 9 *CYILA* (1989) p. 224.

86 GATT, *Final Act*, 55 *UNTS* (1947) p. 194.

87 'Communication from Secretary-General of United Nations Regarding China'. GATT Doc. CP/54, 6 March 1950.

accession through sponsorship under Article XXVI(5)(c).[88] Under the first method, because the PRC had already requested to resume China's status as an original contracting party to the GATT on 14 July 1986,[89] there would be a direct conflict with the PRC if Taiwan chose this method.

As for the third method, Article XXVI(5)(c)[90] stipulates that

> If any of the customs territories, in respect of which a Contracting Party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible Contracting Party establishing the above-mentioned fact, be deemed to be a Contracting Party.

Hong Kong followed this method to get its GATT membership through the sponsorship of the UK.[91] If this method were to be taken, Taiwan would have had to wait for the solution of the PRC's GATT membership problem in order to seek sponsorship, because the PRC reiterated its 'One China Policy' and the position that

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88 For the GATT text, see Jackson and Davey, *1989 Documents Supplement to Legal Problems of International Economic Relations*, 2nd Edition (1989) pp. 1-67.

89 'Communication from the People's Republic of China'. GATT Doc. L/6017 (14 July 1986). Also, see Feng, "China's Membership of GATT: A Practical Proposal," 22(6) *JWT* (1988) pp. 53-70; Wang, "China's Return to GATT: Legal and Economic Implications," 28(3) *JWT* (1994) pp. 51-65.

90 Jackson and Davey, *supra* note 88, p. 39.

91 "Hong Kong Joins GATT, Separate Membership to Continue Even Under Chinese Sovereignty," 3(18) *Int'l Trade Rept.* (30 April 1986) pp. 581-582.

Taiwan should only become a GATT member under the sponsorship of the PRC as its customs territory under Article XXIV(5)(c).[92]

The second method, Article XXXIII[93] of the GATT, provides

> A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the Contracting Parties. Decisions of the Contracting Parties under this paragraph shall be taken by a two-thirds majority.

Obviously, the ROC government chose this method to accede to the GATT. In addition, in order to avoid pressure and opposition from the PRC, the ROC took a delicate position in this decision. It applied to GATT not as a nation state, but as a separate customs territory, the Customs Territory of Taiwan, Penghu, Kinmen and Matsu. This title was used in order to avoid unnecessary issues being raised by the PRC. On the one hand, 'ROC' could be opposed by the PRC in terms of 'two Chinas'. On the other hand, 'Taiwan' could imply independence, which is both contrary to the ROC national policy and provocative to the PRC.[94] Nonetheless, under the separate

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92 Cai, "China's GATT Membership: Selected Legal and Political Issues," 26(1) *JWT* (1992) pp. 50-52; Williams and Moore, "Who Goes First? Taiwan's GATT Application Angers Peking," *FEER* (1 February 1990) p. 36; "Mainland Official on Taiwan Joining GATT," *Beijing Review* (27 August - 2 September 1990) p. 2; "Taiwan Province as a Part of China Has No Right to Join the GATT by Itself," *People's Daily* (20 October 1989) p. 1.

93 Jackson and Davey, *supra* note 88, p. 44.

94 Chiu, "Taiwan's Membership in the General Agreement on Tariffs and Trade," 10 *CYILA* (1990) p. 201.

customs territory title, the fact that the ROC government has effective jurisdiction over a defined territory can be distinct.

(C) Government: The shortest definition of a state for present purposes is perhaps a stable political community, supporting a legal order, in a certain area. The existence of effective government, with centralised administrative and legislative organs, is the best evidence of a stable political community.[95] International law defines 'territory' not by adopting private law analogies of real property, but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some area and population. Territorial sovereignty is not ownership of, but governing power with respect to, territory and the population in it.[96] Taiwan is under the effective control of the ROC government, which was established in 1911 and had its constitution drawn up in 1947. The ROC government has provided the people in Taiwan with a successful political democracy and prosperous economy. These achievements illustrate that the government in Taiwan is an effective government.

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[95] Brownlie, *supra* note 73, p. 73; Guggenheim, 80 *Recueil des cours* (1952-I) p. 83.

[96] Crawford, *supra* note 38, p. 42. N. A. Maryan Green also points out three conditions for a government: 1. it must represent the state, in the sense that it speaks in the name of the population; 2. it must be able to govern this population, in the sense that it can impose its will; 3. it must have some likelihood of permanence, in that, even if the actual government loses office it will be replaced by another. See Green, *International Law* (1987) p. 43.

(D) Capacity to enter into relations with other states: This is the most important requirement for a state. A state must have the capacity to maintain external relations with other states. This would distinguish states from other lesser political components.[97] So far as Taiwan's capacity to enter into relations with other states is concerned, Taiwan keeps official relations with 29 states,[98] it is a member state of some international or regional organisations, it maintains semi-official and unofficial relations with more than 140 states in the world, with some Taiwanese representatives still known as 'Representative of the ROC'.[99] Most of these offices are in fact staffed with government officials authorised to execute the normal tasks of diplomatic missions and enjoy certain privileges and immunities. In fact, this has become standard practice between the ROC and other non-official relations countries. In 1972, when Japan recognised the PRC, an Interchange Association was established in Taipei to represent the Japanese government, although this was not made public. A counterpart authority, Association of East Asian Relations, was established in Tokyo by the ROC

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97 Such as the Free City of Danzig, which was created in the Treaty of Peace with Germany in 1919, and the Free Territory of Trieste, which was created in the Peace Treaty with Italy in 1947. See Brownlie, *supra* note 73, pp. 61-62.

98 *Supra* note 74.

99 They are Trade Mission of the Republic of China, Fiji; Trade Mission of the Republic of China, Papua New Guinea; Trade Mission of the Republic of China, Bahrain; Commercial Office of the Republic of China to Dubai, United Arab Emirates; Commercial Office of the Republic of China to the State of Kuwait; Commercial Office of the Republic of China, Libya; Trade Mission of the Republic of China, Mauritius; Oficina Commercial-Consular de la Republica de China, Bolivia; and Oficina Comercial de la Republica de China, Ecuador. See 30(10) *IAS* (1991) Appendix, pp. 136-139. And Clough, *Reaching Across the Taiwan Strait* (1993) pp. 117-119.

government.[100] In 1975, when the Philippines recognised the PRC, the Philippines established an Asian Exchange Centre in Taipei, whilst the ROC established a Pacific Economic and Cultural Centre in Manila.[101] After the US recognised the PRC in 1978, the former American embassy in Taiwan was replaced by the American Institute in Taiwan and the ROC embassy in the US was replaced by the Coordination Council for North American Affairs.[102] These facts sufficiently demonstrate Taiwan's capacity.

However, as Professor Brownlie has pointed out, "[N]ot all the conditions are peremptory, and in any case further criteria must be employed to produce a working legal definition of statehood."[103] New recognition criteria appear in accordance with different times and different states. The recognition of states following the break up of the Soviet Union and Yugoslavia illustrates Professor Brownlie's opinion.[104] The EC's

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[100] Morley, "The Japanese Formula for Normalisation and Its Relevance for US-China Policy," in Chiu, *Normalising Relations with the People's Republic of China: Problems, Analysis and Documents* (1978) pp. 121-136; Rowe, *Informal Relations: The Case of Japan and the Republic of China, 1972-1974* (1975). The Association of East Asian Representative Office was renamed as Taipei Economic and Cultural Representative Office in Japan in April 1992.

[101] Lotilla, "Reflections on the Framework of Manila-Taipei Relations and Current Bilateral Ocean-Use Disputes," 64 *Philippine Law Journal* (1989) pp. 1-20. In December 1989, Asian Exchange Centre was renamed as Manila Economic Cultural Office and Pacific Economic and Cultural Centre was renamed as Taipei Economic and Cultural Office.

[102] See 'Agreement on Privileges, Exemptions and Immunities between the American Institute in Taiwan and the Coordination Council for North American Affairs, October 2, 1980'. Text reprinted in 1 *CYILA* (1981) pp. 235-240.

[103] Brownlie, *supra* note 73, p. 72.

[104] About the independence movements that occurred in Yugoslavia, see Warbrick, *supra* note 71, pp. 473-482; Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia," 86 *AJIL* (1992) pp. 569-607; Zametica, *The Yugoslav Conflict* (1992).

position on the independence movements and the recognition of those new states was settled in a 'Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union' made on 16 December 1991.[105] In the Guidelines, several requirements for recognition were set out:

> [The Community and its Member States] affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.
>
> Therefore, they adopted a common position on the process of recognition of these new States, which requires:
>
> 1. Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
> 2. Guarantees for the rights of the ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the Conference on Security and Co-operation in Europe;
> 3. Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
> 4. Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
> 5. Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.
>
> The Community and its Member States will not recognise entities which are the result of aggression. They would take account of the effect of recognition on neighbouring States.
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> The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.

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[105] 31 *ILM* (1992) pp. 1485-1487. For discussion, see Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (1994) pp. 125-135; Rich, *supra* note 71, pp. 36-65.

The Guidelines points out several requirements to be recognised by EC member states: respect for the rule of law, respect for democracy, respect for human rights, respect for the inviolability of all frontiers, maintenance of regional stability, and peaceful settlement of disputes. The Guidelines end with "The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations." These requirements are different from those stipulated in the Montevideo Convention and obviously political consideration plays an important role in recognition.[106]

With regard to 'criteria' or 'requirements' of statehood, there is no doubt that the ROC fulfils the objective elements contained in the criteria of statehood in the Montevideo Convention. Therefore, the ROC on Taiwan could be accepted as an independent state and be recognised by other states, but the reality is otherwise. As has been said: there are only 29 countries which have official relations with the ROC. It is not a member state in the UN either, not to mention being a member of the specialised organisations which are subordinate to the UN. Some international lawyers have expressed their opinions on the issue of Taiwan's international status.

L. Henkin, *et at.*, described Taiwan as[107]

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106 For discussion on the Guidelines and recognition, see Bieber, "European Community Recognition of Eastern European States: A New Perspective for International Law?" *ASIL Proc.* (1992) pp. 374-377; Rich, *ibid.*, pp. 42-44, 55; Türk, "Recognition of States: A Comment," 4 *EJIL* (1993) pp. 68-69; Weller, *supra* note 104, p. 589.

107 Henkin, Pugh, Schachter, and Smit, *International Law: Cases and Materials* (1987) p. 278.

"[I]t was acknowledged that Taiwan was under the *de facto* authority of a government that engaged in foreign relations and entered into international agreements with other governments."

Gerhard von Glahn said[108]

"From a factual point of view, the Republic of China continues, of course, to exist as an independent entity, even though it was recognised by only twenty-two members of the family of the nations."

Ian Brownlie remarked that[109]

"[T]he case of territory the title to which is undetermined, and which is inhabited and has an independent administration, creates problems. On the analogy of belligerent communities and special regimes not dependent on the existence of the sovereignty of a particular state ..., communities existing on territory with such a status may be treated as having a modified personality, approximating to that of a state. On one view of the facts this is the situation of Taiwan."

J. Crawford stated that[110]

"[I]ts status is that of a consolidated local *de facto* government in a civil war situation ... It is a party to various conventions binding its own territory. Courts faced with specific issues concerning its status may treat it on a *de facto* basis as a 'well defined geographical, social, and political entity (with)... a government which has undisputed control of the island' ... Internationally the Government of Formosa is a well established *de facto* government, capable of committing the State to at least certain classes of transaction."

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[108] von Glahn, *The Law Among Nations: An Introduction to Public International Law*, 6th Edition (1986) p. 63.

[109] Brownlie, *Principles of Public International Law*, 2nd Edition (1973) pp. 68-69. However, Professor Brownlie does not mention this issue in the later editions of his books.

[110] Crawford, *supra* note 38, pp. 151-152.

Obviously, there is a gap between recognition theory in international law and practical international politics.[111] The following section will expound upon this gap attempting to find a means to narrow the differences.

4.2. RECOGNITION THEORIES

Theories of recognition are often advanced as either constitutive or declaratory theories. With respect to the constitutive theory, the political act of recognition is seen as a necessary precondition to the existence of the capacities of statehood or government. In other words, the international personality of a state depends on the political decision of other states, thus recognition is said to 'constitute' the state or government.[112]

According to the declaratory view, the legal effects of recognition are limited, since recognition is a mere declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law.[113] In other words; the act of recognition is not decisive to the state's claim to statehood, and

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[111] The recognition of new states independent from Yugoslavia can demonstrate this gap.

[112] Jennings and Watts, eds., *supra* note 73, p. 133; Lauterpacht, 3 *Mod. L. Rev.* (1939-40) pp. 1-20; Brierly, *supra* note 73, p. 138; Crawford, *supra* note 38, pp. 17-20; Wright, "Some Thoughts about Recognition," 44 *AJIL* (1950) p. 548.

[113] Allott, *Eunomia: New Order for a New World* (1990) pp. 306-308; Brierly, *ibid.*, p. 139; Brownlie, *supra* note 73, pp. 88-89; Crawford, *ibid.*, pp. 20-23; O'Connell, *supra* note 46, pp. 129-132; Waldock, 106 *Hague Recueil* (1962-II) pp. 147-151.

a state's international legal personality does not depend on its recognition by other states. Brierly expressed the logic of the declaration theory as follows:[114]

> A state may exist without being recognised, and if it does exist in fact, then, whether or not it has been formally recognised by other states, it has a right to be treated by them as a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state, and to declare the recognising state's readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.

The disadvantage of the constitutive theory is that an unrecognised state may not be subject to the obligations imposed by international law and may accordingly be free from such restraints as, for instance, the prohibition of aggression. As far as bilateral relations are concerned, a non-recognised state has no international personality in the view of a non-recognising state. However, it is more complicated and more ambiguous in multilateral relations, if a state were recognised by some states but not others; what would its international personality be then?[115] Hence, the constitutive theory creates more difficulties and problems than it solves in practice.

In practice, the decision to recognise or to withdraw recognition from a state is a matter of political act. In other words, states use recognition as a tool to implement foreign policy. In *Deutsche Continental Gas-Gesellschaft v. Polish State*[116] the German-Polish Mixed Arbitral Tribunal held the same opinion

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114 Brierly, *ibid.*, p. 139.

115 Such as Israel and several Arab states are member states of the UN, but these Arab states do not recognise Israel. Cf., *supra* note 81.

116 5 *Annual Digest of Public International Law Cases* (1929-1930) p. 15.

> [A]ccording to the opinion rightly admitted by the great majority of writers on international law, the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognised by the States from which it emanates.

Based on the above discussion, according to international practice, recognition is not a precondition for a state to exist. For example, the US did not recognise the USSR until October 1933,[117] although the latter was established in 1922 and there were 26 states which had recognised it before the US did.[118] The non-recognition of the US did not influence the Soviet Union's existence. The same effect also applies to Taiwan.

In international practice, it is true that no official relations exist between State A and State B if State A does not recognise State B. Given this, State B cannot exercise all the capacities of statehood in international law in State A. Such capacities[119] include diplomatic intercourse, privileges, immunities, and the establishment of diplomatic missions. In the English law system, an unrecognised government or state cannot be a party to actions before an English municipal court. Hence all the actions

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117 'USSR-US Exchange of Communications between the President of the US and the President of the All Union Central Executive Committee, October 1933'. See 28 *AJIL* (1934) Supplement, Official Documents, p. 1.

118 Editorial Comment, *Recognition of Russia*, 28 *AJIL* (1934) p. 90.

119 See 1961 Vienna Convention on Diplomatic Relations, 500 *UNTS* 95; UN Doc. A/CONF.20/13.

made by it would be regarded as null and void.[120] Nonetheless, Lord Denning M. R. felt this would not be a fair situation for both parties. In *Hesperides Hotels Ltd.* v. *Aegean Turkish Holidays Ltd.*, he stated:[121]

> "If it were necessary ... I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government *de jure* or *de facto* at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth."

In the case of UK-ROC relations, for example, the UK government maintained diplomatic relations with the ROC government till the PRC was established. On 6 January 1950, the UK government declared that[122]

> [H]aving completed their study of the situation resulting from the formation of the Central People's Government of the People's Republic of China, and observing that it is now in effective control of by far the greater part of the territory of China, have this day recognised that government as the *de jure* government of China.

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[120] See Lord Reid's opinion in *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd.*, [1967] 1 A.C. 853, p. 907. For the discussion on UK policy of recognition, see Symmons, "United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by Another Name?" [1981] *Pub. L.*, p. 249; Talmon, "Recognition of Governments: An Analysis of the New British Policy and Practice," 63 *BYIL* (1992) p. 231.

[121] [1978] Q.B. 205 (C.A.) at 218. Cf. *Carl Zeiss Stiftung v. Rayner and Keeler, Ltd.* case, *ibid.*

[122] 'Note from the British Foreign Secretary, Mr. Bevin, to Chou En-Lai Announcing the Recognition of the Central People's Government as the DE JURE Government of China by the Government of the United Kingdom, 6 January 1950'. Cited from Cohen and Chiu, *supra* note 68, p. 213.

On the same day, the UK government also withdrew recognition of the ROC government and informed the Chinese Ambassador in London.[123] Nonetheless, the UK government still had certain legal relations, such as acceptance of passports, with the Taiwan authority and maintained a consulate in Tamsui, Taiwan until 1972.[124]

Owing to the fact that the UK government recognises the PRC, the UK Foreign and Commonwealth Office stated, almost periodically, that the British government neither recognises Taiwan as a government nor has official dealings with the authorities there.[125] Notwithstanding, these official statements do not prevent the UK government from having unofficial contacts with the ROC government in Taiwan whereby British interests can be protected.[126] As the Parliamentary Under-Secretary for Foreign and Commonwealth Affairs remarked in response to the question of what machinery existed to enable communication between Taiwan and the British

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123 *The Times* (7 January 1950).

124 Crawford, *supra* note 38, pp. 143-152; 6 *ICLQ* (1957) pp. 507-508; *British Practice in International Law* (1964) p. 25; HC, Debs., vol. 833, col. 35: 13 March 1972; and Clough, *Island China* (1978) p. 154.

125 See HC Debs., vol. 988, Written Answers, col. 41: 7 July 1980; HC Debs., vol. 17, Written Answers, col. 279: 8 February 1982; HC Debs., vol. 55, Written Answers, col. 226: 29 February 1984; HC Debs., vol. 71, Written Answers, col. 549: 24 January 1985; HC Debs., vol. 81, Written Answers, col. 149: 19 June 1985; HC Debs., vol. 160, Written Answers, col. 119: 14 November 1989; HC Debs., vol. 170, Written Answers, col. 705: 4 April 1990; HL Debs., vol. 521, col. 1786: 26 July 1990; HC Debs., vol. 184, Written Answers, col. 692: 1 February 1991; HC Debs., vol. 191, Written Answers, col. 342: 20 May 1991; HC Debs., vol. 196, Written Answers, col. 293: 18 October 1991. Cf. *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.*, [1956] 2 Q.B. 552.

126 HC Debs., vol. 191, Written Answers, col. 342: 20 May 1991.

government, "We have no governmental dealings with the authorities in Taiwan. There are established unofficial means through which British interests are promoted."[127]

Between 1972 and 1992 the UK had no diplomatic service personnel stationed in Taiwan. Consular and other quasi-diplomatic relations were carried out through the Anglo-Taiwan Trade Committee (ATTC), which had offices in both London and Taipei. Run principally by businessmen, its main purpose was to promote trade between Britain and Taiwan.[128] In terms of trading relations, UK trade with Taiwan is roughly equal in value to UK trade with the PRC, if re-exports via Hong Kong are taken into account. The UK's trade with Taiwan grew faster over the past twelve years from 1981 to 1992 inclusive than it did with the PRC. Over this period UK imports from Taiwan grew in value terms by 434%, whilst UK exports to Taiwan grew by 464%.[129] In addition, a Visa Handling Office was established within the ATTC in Taipei in 1989 to deal with visa issuing affairs.[130] In 1992 a diplomat from the Foreign and Commonwealth Office was seconded as the new Director of the ATTC. In October

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127 *Ibid.*

128 HC Debs., vol. 159, Written Answers, col. 348: 3 November 1989; First Report from the Foreign Affairs Committee, House of Commons, Session 1993-94, *Relations Between the United Kingdom and China in the Period Up to and Beyond 1997*, Vol. I (1994) para. 70.

129 *Relations Between the United Kingdom and China in the Period Up to and Beyond 1997*, *ibid.*, paras. 108-111.

130 HC Debs., vol. 201, Written Answers, col. 712: 17 January 1992. The UK Visa Handling Office in Taipei had issued 78,782 visas by 1991.

1993 the ATTC was renamed the British Trade and Cultural Office, with a deputy-director seconded from the Department of Trade and Industry.[131]

As far as the non-recognised state's municipal law is concerned, Taiwanese law can be accepted by the UK government if it is based on reciprocity. In reply to a question on the subject of copyright piracy in Taiwan, the Minister of State, Department of Trade and Industry, wrote:[132]

> It is not possible for the Government to make representations direct to the authorities in Taiwan, which the United Kingdom does not recognise. Taiwan has, however, recently introduced a new copyright law which will protect foreign works if they are registered in Taiwan, provided that the country of which the authors of those works are nationals gives reciprocal copyright protection. To ensure eligibility of works of United Kingdom authors for registration in Taiwan, the United Kingdom made an Order in Council on 18 November 1985 providing the necessary protection in the United Kingdom for works originating in Taiwan. No further action is contemplated unless there is evidence that the new Taiwan law is failing to protect United Kingdom works against copyright piracy.

As for US-ROC relations, the situation is similar. After the US announced its recognition of government of the PRC in December 1978 and withdrew its recognition of the ROC government on Taiwan from 1 January 1979,[133] it still enacted the Taiwan Relations Act (TRA) of 1979[134] to treat Taiwan as a state:

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131 *Relations Between the United Kingdom and China in the Period Up to and Beyond 1997*, *supra* note 128, para. 70.

132 HC Debs., vol. 82, Written Answers, col. 190: 19 March 1986.

133 18 *ILM* (1979) pp. 272-275.

134 For text of Taiwan Relations Act 1979, 18 *ILM* (1979) p. 873; 73 *AJIL* (1979) pp. 669-677.

> Sec. 4 (b)
> (1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

Also, in order to maintain US commercial, cultural, and other relations with Taiwan without official representative, the American Institute in Taiwan (AIT) was established to fulfil those functions under the stipulation of the TRA:

> Sec. 6 (b)
> Whenever the President or any agency of the United States government is authorised or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

Hence, the AIT actually performs most of the same functions that were previously performed by the US embassy in Taiwan.

Therefore, from the view of international law and practice, recognition should not be a precondition to the existence of a state and the declaratory theory seems to provide a better answer on recognition issues.

4.3. REMARKS

From the above discussion, it is apparent that pressure from the PRC is a major influence in the interaction between the ROC and other countries. Even so, it is well known that Taiwan is under the full control of the *de facto* authority of a government which has, either formally or informally, engaged in foreign relations and enters into

international agreements with other governments.[135] Additionally, the population of Taiwan is under the jurisdiction of the ROC government, not the PRC government.[136] In which case, it is undesirable that the population of such an area should be regarded as 'stateless' in law and the government which has jurisdiction over this area would be categorised as a subordinate province under another country.

In theory, a non-recognised state cannot enjoy the full function that a state can. But, in practice, a non-recognised state is still a member of the international community, just as an international law scholar states:[137]

> It is generally admitted that an unrecognised state cannot be completely ignored. Its territory cannot be considered to be no-man's-land; there is no right to overfly without permission; ships flying its flag cannot be considered stateless, and so on.

Therefore, the ROC government is still a legal government, although it is no longer recognised by certain countries which had recognised it before. Furthermore, the ties between Taiwan and all other states should be improved so that their mutual interests can be protected and promoted. This is of particular importance, when considering the fishery issues and disputes, which is the focus of this study. The

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135 Henkin, et al., *supra* note 107, p. 278; Crawford, *supra* note 38, p. 152.

136 *Reel* v. *Holder and Another* [1981] 3 All E.R. 321, C.A.; also *Sheng* v. *Rogers (1959)* 54 *AJIL* (1960) p. 189.

137 Mugerwa, "Subjects of International Law," in Sørensen, ed., *Manual of Public International Law* (1968) p. 269. Compared with the situation of Serbia and Montenegro (Federal Republic of Yugoslavia), although it is not recognised by most of the states and is not a member of the UN, its action still can not be ignored. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Yugoslavia* (Serbia and Montenegro)) *I.C.J. Reports 1993*, p. 3.

Taiwanese fishing industry represents one of the strongest distant-water fishing fleets in the world. Taiwan contributes to the global fishing industry, but it also has fishing-related disputes with other states. However, because of non-recognition, Taiwan has encountered several difficulties in resolving fishery disputes with other states. Even if the ROC is not recognised by other states, this does not preclude them from entering into agreements with Taiwan, especially in promoting and protecting fishery interests. We shall identify in the following section the impact of non-recognition of Taiwan in dealing with its international fishery disputes.

5. THE IMPACTS OF THE INTERNATIONAL RECOGNITION ON TAIWAN

In this section, we will have a preview on the impact of the international recognition on Taiwan when it deals with international fishery disputes. The author will limit the discussion to three types of impact.

5.1. STATELESSNESS[138]

A stateless vessel is a vessel without nationality or a vessel assimilated to a vessel without nationality. A vessel is recognised as a stateless vessel under the following conditions:

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138 Statelessness can apply to individuals as well as vessels. In the former case, see 1961 United Nations Convention on Reduction of Statelessness, 11 *ICLQ* (1962) p. 1090; Mutharika, *The Regulation of Statelessness Under International and National Law* (1977). Due to the purpose of this research, the following discussion is focused on the statelessness of vessels.

(A) When a vessel sails under two or more different flags and uses them according to convenience.[139] The 1958 Geneva Convention on the High Seas, Article 6 reads:

> Article 6
>
> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
>
> 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Similarly, the LOSC, Article 92 uses the same wording to regulate that a vessel only sails under one flag.

(B) When a vessel has been deprived of the use of a flag by a country which the vessel claims as its flag or the vessels claimed state of nationality denies that such is the case.[140]

(C) When the state of the vessel is not recognised by the questioning state.

In this chapter, we have already discussed Taiwan's international legal status. Given that Taiwan is not recognised by most countries, is it possible that its fishing vessels would be treated as a stateless ship on the high seas? In the case of Taiwan, as

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139 1958 Geneva Convention on the High Seas, Article 6(2) and 1982 LOSC, Article 92(2).

140 Meyers, *The Nationality of Ships* (1967) pp. 313-315.

we are dealing with its status, condition (C) is at issue in this study, which is a fairly rare situation.[141]

In theory, if State A does not recognise State B, then a vessel of State B could be considered by State A as a ship without nationality. Therefore, a non-recognising state would treat a ship from the non-recognised state as stateless and would not allow this ship to enter its port, not to mention offering it any port services. In 1931, a letter from the US Secretary of State Moore to the US Secretary of Commerce Roper set out the attitude to be taken with respect to a ship which wanted to put into an American port while claiming Manchurian nationality. The Secretary of State wrote: [142]

> [T]here is from the point of view of international relations no such thing as a Manchurian flag, nor would any document issued by Manchurian have any validity from any point of view.

Hence, if the ship had entered an American port, the Secretary would therefore have considered it as stateless, because the US did not recognise Manchuria as a state.[143] If condition (C) is applied to Taiwan, Taiwanese fishing vessels, theoretically, may be considered as stateless vessels on the high seas or when they want to enter other states' ports.

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141 For full discussion on 'statelessness', see Chapter 6.

142 Meyers, *supra* note 140, p. 311.

143 *Ibid.* Cf. *Molven v. Attorney General for Palestine* Case, [1948] A.C. 351; also the Stimson Doctrine of Non-recognition, see Hackworth, *Digest of International Law*, Vol. 1 (1940) p. 334.

5.2. INABILITY TO PARTICIPATE IN INTERNATIONAL ORGANISATIONS

In 1971 the ROC was excluded from the United Nations and the PRC admitted in its place.[144] Since then, the ROC has not officially participated in any conference sponsored by the United Nations. In consequence, it lacks formal or official opportunity to present its views on controversial issues. Moreover, owing to the hostility between Taiwan and the PRC, 'One China Policy'[145] becomes a very good reason for the latter to attempt to prevent the conclusion of any agreement between Taiwan and other countries, especially if such other countries have diplomatic relations with the PRC. Ever since its founding in 1949, the PRC has claimed to be the sole legal government of China. Because of the PRC's strong opposition, the ROC was unable to attend UNCLOS III,[146] even though the ROC did participate in UNCLOS I and II with its UN membership.

However, the ROC's exclusion from UNCLOS III did not prevent it from seeking to negotiate with its neighbours in order to settle maritime boundary problems

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[144] For the issue of the ROC's withdrawal from the UN and the issue of Chinese representative in the UN, see *supra* Sub-Section 3.2. Also, cf. *infra* Chapter 7.

[145] See *supra* Section 3.

[146] On 15 October 1973, when the UN Political and Security Committee discussed the question of a solution concerning the convening of UNCLOS III, the PRC delegate, Ling Ching, specifically emphasised that the "Chiang Kai-Shek clique should not be invited to attend the Conference on the Law of the Sea." In "Recommendation for Holding United Nations Conference on the Law of the Sea," 45 *Hsinhua Weekly* (5 November 1973) p. 22. Cited from Chiu, *Chinese Attitude Toward Continental Shelf and Its Implication on Delimiting Seabed in Southeast Asia* (1977) p. 14.

on the basis of the principles of international law. Its lack of progress in this matter lies largely in the absence of diplomatic relations with its neighbours. Following the diplomatic isolation of the ROC and the recognition of the PRC as the sole legal government of China,[147] the Philippines has been unwilling to discuss the maritime boundary problem in the Bashi Channel with the ROC.[148] The PRC has also repeatedly warned that no agreement concluded between any country and the ROC shall be recognised by it, and has also threatened to retaliate against any country which concludes any such agreements.[149] The political reality of non-recognition significantly constraints Taiwan when it seeks to participate in international conferences and organisations where it would potentially have to negotiate with other states.

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147 The Philippines established official relations with the PRC on 9 June 1975 and severed diplomatic relations with the ROC on the same day.

148 It is reported that, after several fishery disputes happened between the ROC and the Philippines, A. M. Tolentino, Deputy Minister of Ministry of Foreign Affairs of the Philippines, expressed:

> "Taiwan is not a country, so it doesn't have the ability to declare an exclusive economic zone. Besides, owing to there is no diplomatic relations between us, we don't know which one we should negotiate with--Taiwan or PRC?"

See *China Times* (7 September 1979) p.3.

149 For the PRC's point of view on the relations between the ROC and other countries, see *supra* Sub-Section 3.3.

5.3. INABILITY TO CONCLUDE AGREEMENTS WITH OTHER STATES

As far as the capacity to conclude agreements or treaties is concerned, every 'state' possesses this capacity.[150] Again, statehood is an important element in obtaining this capacity. According to the International Law Commission's Commentary,[151] the term 'state' used in Article 6 of the Vienna Convention on the Law of Treaties is

> [W]ith the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Convention on Diplomatic Relations; i.e. it means a State for the purpose of international law.

Under this circumstance, Taiwan's capacity to conclude agreements is restricted if the other parties consider Taiwan is not a state.[152] In the case of a bilateral agreement, a non-recognising state could refuse to negotiate with Taiwan. In multilateral agreements, the non-recognised government will not be regarded by non-recognising states as competent to make its state a party to a multilateral treaty. Due to its recognising the PRC, the UK refused to regard the signature by the ROC government to the International Sugar Agreements of 1953 and 1958 as a valid signature on behalf of China.[153] The UK issued the following declaration:

> At the time of signing the present Agreement I declare that since the Government of the United Kingdom does not recognise the Nationalist authorities as the competent Government of China ...

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[150] Vienna Convention on the Law of Treaties, Article 6 provides: "Every state possesses capacity to conclude treaties." Also, The *Wimbledon* Case, PCIJ, Series A, No. I, p. 25.

[151] *YILC* (1966) Vol. 2, p. 192.

[152] *Supra* note 148.

[153] See Whiteman, *supra* note 21, vol. 2, pp. 53-54; 6 *ICLQ* (1957) pp. 302-303, 508-509.

In the *International Registration of Trade-Mark (Germany)* Case, the judgement of the court make this point clear[154]

> In relation to other States which do not recognise it as a subject of international law, such an entity cannot be a party to a treaty ...
>
> Hence, under the non-recognition circumstances, it is difficult for Taiwan to conclude agreements with other states.

6. OBSERVATIONS

The ROC, by holding a tiny part of the so-called 'Chinese territory' and possessing a small population in relation to the huge population on mainland China, finds difficulty in being recognised by other states as the sole legitimate government of China. The ROC is discouraged from claiming, however, that it is a 'Taiwanese government', because this would inevitably provoke tense relations with or even a military invasion from the PRC. In recent years, the ROC government has taken pragmatic measures to demonstrate that two Chinese governments exist in China, each government with its own jurisdictional land and population. The ROC's political status situation is improving, although it is still not recognised by most states.

In this chapter, we have identified the consequences of non-recognition, by which Taiwanese fishing vessels could be considered as stateless vessels on the high seas. It is difficult for Taiwan to enter into negotiations and conclude agreements with

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154 *International Registration of Trade-Mark (Germany)* Case, 28 *ILR* (1959) p. 82. Also Jennings and Watts, eds., *supra* note 73, p. 199.

other states. The impacts of such will be discussed in Part III. In the following chapter, we will analyse the maritime claims of the littoral states in the South China Sea region, in which Taiwan is a relevant party.

CHAPTER FOUR

MARITIME CLAIMS OF THE LITTORAL STATES IN THE SOUTH CHINA SEA

1. INTRODUCTION

The development of the law of the sea is heavily influenced by national security interests and economic interests.[1] As regards security interests, a broad band of territorial sea offers a form of security which is as much a form of psychological or political security as it is a practical defence against an attack from a foreign country.[2] In terms of economic interests, coastal states are primarily interested in gaining access to the resources of its marine areas. Therefore, extending territorial waters becomes a means to secure the coastal states' rights to the resources and the interest of security.[3] On the other hand, major naval powers or distant-water fishing nations, which have

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1 Lewis M. Alexander puts forth four basic components of the national marine interests, namely accessibility, investment, dependence, and control. See Alexander, "Indices of National Interests in the Ocean," 1 *ODIL* (1973) pp. 21-49. Nonetheless, they are still within the sphere of security and economic interests.

2 Bowett, *The Law of the Sea* (1967) pp. 7-8; O'Connell, *The Influence of Law on Sea Power* (1975) pp. 16-21.

3 Bowett, *ibid.*, p. 10.

stronger navigation interests tend to view international law in a functional way,[4] thus conflicts of interests between coastal states and naval powers or distant-water fishing nations become an inevitable phenomenon on high seas fisheries. The circumstances in the South China Sea is a good example of this situation.

Since the 1970's, extending jurisdiction over adjacent maritime areas has become a major trend in the international law of the sea and is not a phenomenon limited to Taiwan and other Southeast Asian states.[5] The purpose of this Chapter is to present an outline of the maritime claims of the littoral states of the South China Sea. Besides, their claims to the island groups will also be presented. This then reveals the overlapping situation in this region. For the purpose of this research, only the states which have overlapping claims with Taiwan in the region will be introduced, rather than introducing the claims of all the littoral states of the South China Sea.

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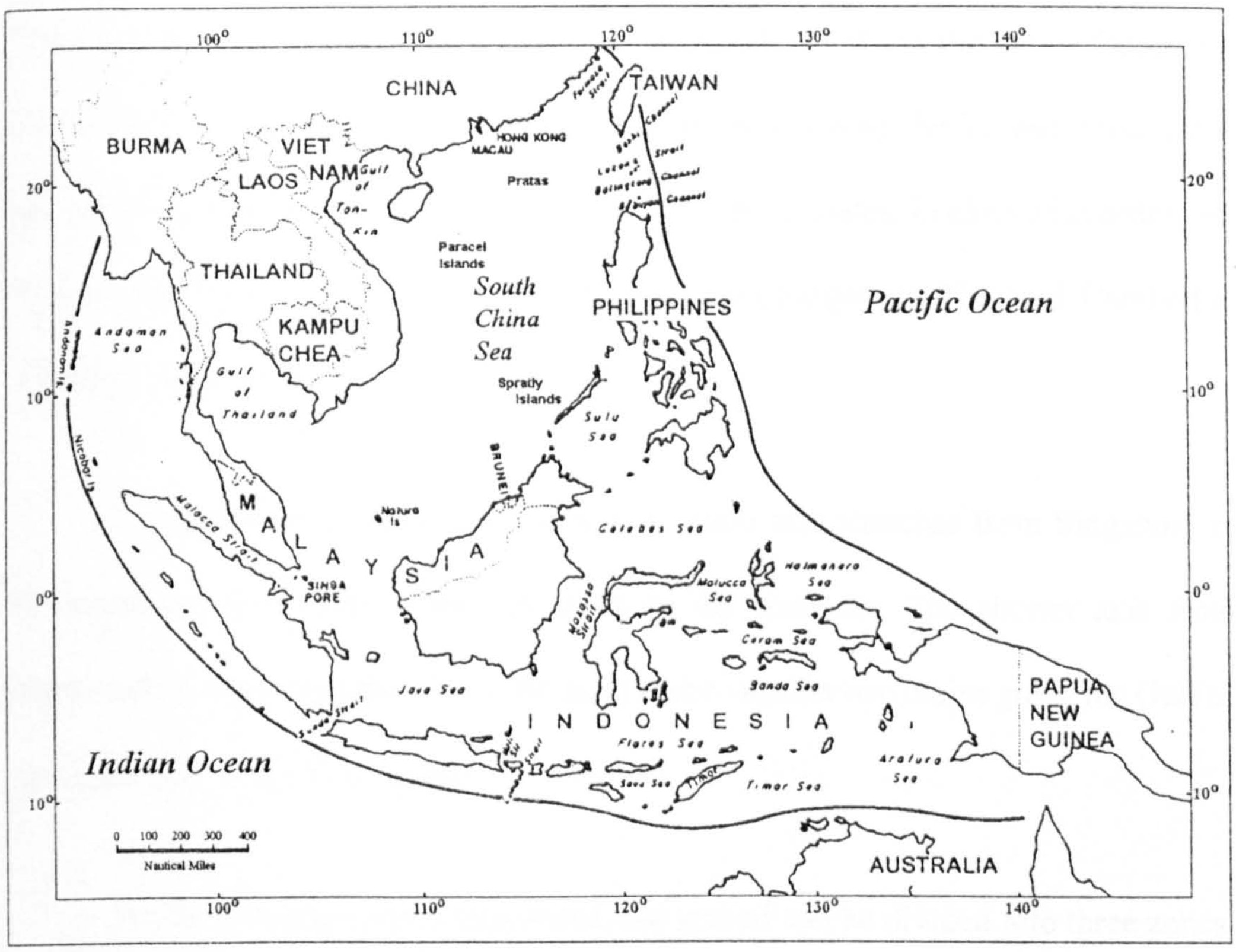
4 For the interests of the naval powers, see Booth, *Law, Force and Diplomacy at Sea* (1985) pp. 61-72; Janis, *Sea Power and the Law of the Sea* (1976). Also Jónsson, *Friends in Conflict: The Anglo-Iceland Cod Wars and the Law of the Sea* (1982).

5 See Chapter 2, Sections 2 and 3.

Map 2 South China Sea: The Area



Source: Chullasorn and Martosubroto, *Distribution and Important Biological Features of Coastal Fish Resources in Southeast Asia* (1986).

1.1. GEOGRAPHICAL BACKGROUND

The South China Sea, with an area of more than one million square nautical miles, is not only the largest maritime area in the Southeast Asian region, but is also the

twenty-sixth largest basin in the world.[6] It is bounded on the east by the Philippine Deep and the Pacific Ocean, on the west by the Sunda Shelf and the Indian Ocean, on the south by the Indonesian archipelago, and on the north by the Taiwan Strait (also known as the Formosa Strait).<See Map 2> The littoral states, in clockwise order, are Taiwan, the Philippines, Malaysia, Brunei, Indonesia, Singapore, Thailand, Cambodia, Vietnam, and the PRC.

Geographically, the South China Sea's main axis stretches from Singapore in the southwest to Taiwan 1,500 nm away to the northeast. The shorter axis from Vietnam to Sabah measures about 480 nm. On the west lie two major gulfs, the Gulf of Thailand and the Gulf of Tonkin.[7]

As far as topography is concerned, the seabed can be divided into three zones. First, there is a broad, shallow continental shelf which occupies the entire Gulf of Thailand and continues southeastwards to the western tip of the island of Borneo. Secondly, this shelf continues with two arms skirting the sea shores. The section which follows the coast of Vietnam narrows to about 30 nm before broadening again to occupy the Gulf of Tonkin and extending more than 120 nm off Hongkong. The eastern continuation of the main continental shelf, along the north coast of Borneo, remains narrow throughout its length. The third zone occupies the main basin of the

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6 Isa and Noordin, *The Status of the Marine Fisheries in the South China Sea* (1993) p. 2; Morgan and Valencia, eds., *Atlas for Marine Policy in Southeast Asian Seas* (1983) p. 4; Valencia, "The South China Sea: Prospects for Marine Regionalism," 2 *Mar. Pol.* (1978) p. 87.

7 Prescott, *The Maritime Political Boundaries of the World* (1985) p. 210.

South China Sea, and represents an area of confused topography. Northeast of the main continental shelf the slope descends by a series of terraces covered with material derived from the continental shelf. This transition zone is succeeded by volcanic seamounts which are sometimes crowned by coral reefs and islands in the Spratly Group. To the northeast again, the mass of islands is replaced by an abyssal plain with depths of more than 4,000 metres.[8]

The region has an equatorial climate, modified by a monsoonal wind system. Surface water circulation within the region varies with the monsoons. During the northeast monsoon, water flows from the north along the mainland coast of Asia and into the South East Asian region, and this circulation is essentially reversed during the southeast monsoon.[9]

1.2. HISTORICAL BACKGROUND

Since the 1930's, the island groups in the South China Sea, namely the Pratas Islands, Macclesfield Bank, Paracel Islands, and Spratly Islands, have been partly occupied or claimed by the United Kingdom, France, and Japan respectively.[10]

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8 *Ibid.*

9 Isa and Noordin, *supra* note 6, p. 2; Soegiarto, "The South China Sea: Its Ecological Features and Potentials for Developing Cooperation in Marine Scientific Research and Environmental Protection," (1990) p. 84.

10 Marston, "Abandonment of Territorial Claims: The Cases of Bouvet and Spratly Islands," *BYIL* (1986) pp. 344-356.

The primary basis of the British claim was the visits made to the islands in 1864 by Captain Ward on H.M.S. Rifleman; in 1877, by a ship crew; and in 1889, by Captain Kerr.[11] However, none of these visitors performed any act which could be regarded in international law as amounting to a claim to, or assertion of sovereignty, nor any alleged evidence providing proof of effective occupation by Britain as demanded by the standards of international law then current.[12]

Since the first French vessel, the *Amphitrite,* sailed to the South China Sea in 1701, France had been interested in these waters.[13] During the 1850's, while China was drawn by its domestic rebellions[14] and the invasions of other western powers, France extended its influence into South Vietnam and Southwest China. China had been aware of French ambition and in 1884, in order to maintain its suzerainty over Vietnam, China went to war with France. Nonetheless, China was defeated during the Sino-French War (1884-1885) and lost control over the South China Sea. As a result, foreign powers extended their influence to this area.[15]

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11 *Ibid.*, pp. 344, 348.

12 Yu, "Who Owns the Paracels and Spratlys? - An Evaluation of the Nature and Legal Basis of the Conflicting Territorial Claims," 9 *CYILA* (1989) p. 9.

13 *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands* (1975) pp. 23-24.

14 See Chapter 3, Section 2.

15 Samuels, *Contest for the South China Sea* (1982) pp. 44-47.

Following the Japanese seizure of Taiwan after the Sino-Japanese War in 1895,[16] Japan extended its influence further southward to the South China Sea. Since the beginning of the twentieth century, the Japanese government had encouraged Japanese entrepreneurs to exploit and develop guano in some islands.[17] On 30 March 1939, on the eve of the Second World War, Japan announced it was placing the Paracels and the Spratlys under its jurisdiction.[18]

Proclaiming annexation, the French government purported to extend its sovereignty not only over the Spratly and Amboyna Cay, but also over "all islands, islets and reefs in the area lying between latitude 7° and 12° North and west of the triangular zone reserved to the United States sovereignty by Article 3 of the treaty between that country and the Philippines of 10 December 1900."[19] Ignoring Chinese and Japanese protests,[20] France, in the spring of 1933, occupied two principal islands, Itu Aba and Spratly, and seven other islands of the Spratly archipelago. On 26 July 1933, Paris publicly proclaimed the annexation of these nine islands.[21] In the ensuing Anglo-French negotiations on how to obstruct the ever increasing Japanese penetration of the region, France refused categorically to accept British sovereignty over, or to

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16 See Chapter 3, notes 14-17 and the accompanying text.

17 Samuels, *supra* note 15, p. 53; Marston, *supra* note 10, pp. 351-352.

18 Park, *East Asia and the Law of the Sea* (1983) p. 185.

19 Marston, *supra* note 10, pp. 345-346.

20 Heinzig, *Disputed Islands in the South China Sea: Paracels-Spratlys-Pratas-Macclesfield Bank* (1976) p. 28.

21 *Ibid.*; *Keesing's* (1937-40) p. 3521; Park, *supra* note 18, p. 185.

cede or lease, the Thi-tu or Itu Aba islands to Great Britain.[22] Amid this Anglo-French deadlock, Japan proceeded to occupy the Spratly group in 1938, and, early in the next year, all the other archipelagos north of it in the South China Sea. In its declaration of 30 March 1939, Japan renamed all the island-groups it occupied as Sin Nan Islands and incorporated them into the territory under the jurisdiction of the Governor-General of Taiwan.[23] To this, whereas the ROC strengthened its efforts in waging the then on-going war against Japan which was to last until 1945, Great Britain protested strongly, saying, "If it comes to a conflict of claims, it should be recalled that His Majesty's Government had never formally abandoned the claim which they had at one time put forward to these islands ..."[24]

After the Second World War, the Chinese government took over those islands occupied by Japan and placed them under its administration. Nonetheless, the littoral states, Vietnam, the Philippines, and Malaysia, gradually occupied some islands of these two groups of archipelagos. The littoral states were attracted by the abundant fishery resources and the high possibility of hydrocarbon resources in this area; and that the islands played important strategic roles because they controlled the sea routes between the Indian Ocean and the Pacific Ocean.[25] For these reasons, the littoral states are encouraged to occupy the islands so that they can claim the rights to those islands

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22 Yu, *supra* note 12, p. 10.

23 *Foreign Relations of the United States: Japan (1931-1941)* Vol. 2 (1943) pp. 278-280.

24 Marston, *supra* note 10, p. 353.

25 See *infra* Section 2.

and the maritime areas surrounding them in the future. These reasons will be examined in the following section. Owing to the scope of this research, the analysis of the importance of the South China Sea will focus on the fishery resources.

2. IMPORTANCE OF THE SOUTH CHINA SEA

As mentioned in the previous section, 90% of the South China Sea is rimmed by land. As such, it can be viewed as a 'geopolitical lake' over which rival and overlapping claims to areas of seabed and to living resources bring nearly all of the littoral states into scenarios of conflict, negotiation, or co-operation, resulting in a web of interlocking interests.[26] This is why the South China Sea has long been an area of conflict among states, either littoral states or extra-regional powers. The following discussion will be on the reasons for such conflicts.

2.1. STRATEGIC POINTS

Owing to its heavy transport traffic, the South China Sea constitutes one of the busiest sea transport routes in the world. Because of this, some of the islands and straits have considerable strategic importance.

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26 Lim, "The South China Sea: Changing Strategic Perspectives," in MacAndrews and Sien, eds., *Southeast Asian Seas: Frontiers for Development* (1981) pp. 230-231.

Exercise of sovereign control of the islands presents a potentially central and commanding position in this region. The Pratas Reef, the Paracel Islands, and the Spratly Islands are the important islands in the South China Sea.<See Map 3> Since the Spratly Islands were used as a staging area by the Japanese forces in launching their initial attacks on the Philippines, Filipinos believe that maintaining a hold on the Spratly Islands is important to their national security. It also serves as a base from which to combat smuggling activities.[27]

As regards straits, they are important not only because restrictions upon passage would seriously dislocate international commerce,[28] but also because controlling them permits a country to have influence over a much larger area on either side of the strait.[29] In the South China Sea, strategically vital sea lines of communication and transportation, which link the Indian and Pacific oceans via the Malacca, Sunda, and Lombok straits, run through several island groups. In the case of Indonesia, as one of the two archipelagic states in this region, controlling straits has long-term strategic significance. As <Map 3> illustrates, two traffic routes in the

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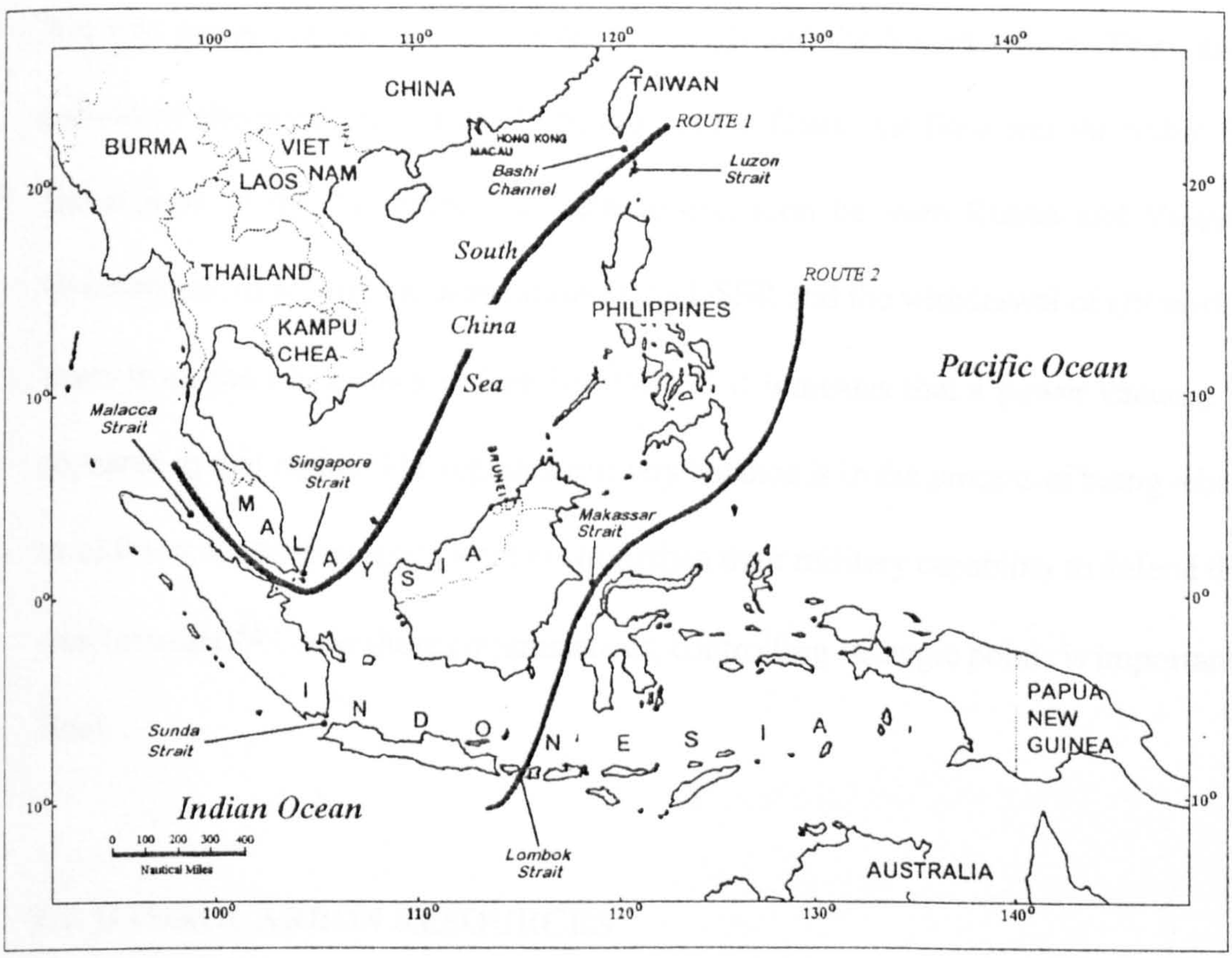
27 Ferndandez, *The Philippines 200-Mile Economic Zone* (1982) p. 76; Tolentino, *The Philippines and the Law of the Sea: A Collection of Articles, Statements, and Speeches* (1982) p. 24; Valero, "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" 18 *Mar. Pol.* (1994) p. 342.

28 Leng, *Southeast Asia and the Law of the Sea* (1978), p. 20; Park, *supra* note 18, p. 182; Valencia and Marsh, "Access to Straits and Sealanes in Southeast Asian Seas: Legal, Economic, and Strategic Considerations," 16 *JMLC* (1985) pp. 537-542.

29 Morgan, "Marine Regions and Regionalism in South-East Asia," 8 *Mar. Pol.* (1984) pp. 302, 307-309; Valencia and Marsh, *ibid.*, pp. 542-549.

Map 3 South China Sea: Strategic Straits



Source: Morgan and Valencia, eds., *Atlas for Marine Policy in Southeast Asian Seas* (1983). Amended by the Author.

South China Sea area link Europe and the Middle East and Asia. The Malacca Strait remains by far the most important passage through Indonesian waters, handling up to 270 ships a day or 100,000 a year. Another route (Route 2 in Map 3) also plays an important role in the transportation, and it has been designed as a way of relieving congestion in the Malacca Strait.[30]

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30 McBeth, "Troubled Waters: Proposed Sea Lanes Spark Concern," *FEER* (29 December 1994) pp. 18-19.

In terms of international defence strategy during the Cold War, the South China Sea was important for the superpowers, the US and the Soviet Union. This can be proved by the presence of the US military at the Clark Air Base and the Subic Bay Naval Base in the Philippines, and the co-operation between Russia and Vietnam. Nonetheless, following the dissolution of the USSR and the withdrawal of US military bases from the Philippines in October 1992,[31] it indicates that a power vacuum has appeared in this region. The regional military balance is in the process of being rebuilt. In addition, the littoral states want to strengthen their military capability to defend their own interests.[32] Under these circumstances, controlling strategic points is important to them.

2.2. HYDROCARBON RESOURCES

As regards non-living resources in the South China Sea, hydrocarbons are the most important and attractive ones. These hydrocarbon resources encouraged the littoral states to occupy islands in order to claim rights in future negotiations. In addition, competition for resources could also trigger war.

The Sunda Shelf and the Sahul Shelf mark the geological limits of Asia and Australia. Although now covered by 20-45 fathoms of water, both of these areas once

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31 Greene, ed., The Philippine Bases: Negotiating for the Future (1988); Simon, "U.S. Interests in Southeast Asia: The Future Military Presence," 31 *AS* (1991) p. 662; Bowring and McBeth, "Basis of Dependence," *FEER* (12 April 1990) pp. 20-23.

32 *Infra* Chapter 5, Sub-Section 4.1.

stood above sea level before the melting of the Quaternary ice which caused the sea gradually to rise to its present level. The seas above these shelves, the Malacca Straits, the southern part of the South China Sea, the Sunda Sea, and the Java Sea, are remarkable not only for their shallowness but also for the uniformity of their shallowness, which is mostly about 20 fathoms.[33] Beneath these areas, interest centres chiefly on the hydrocarbon resources.[34] Nonetheless, it is still unclear how great the hydrocarbon resources deposits are.

According to Chinese surveys, hydrocarbon deposits in the continental shelf around the Spratly Islands amount to 25 billion cubic metres of natural gas, 370,000 tons of phosphorous, and 105 billion barrels of petroleum. The James Shoal area contains another large deposit basin with an estimated 91 billion barrels of oil.[35] The Reed Bank, for example, promises to be a big reservoir of natural gas and oil. A World Bank-Asian Development Bank mission reported that "the country has relatively certain remaining recoverable reserves of between 100 to 500 million barrels in addition to the approximately 30 million barrels of discovered but still unproduced

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33 Leng, *supra* note 28, p. 12.

34 DuBois, "Review of Principal Hydrocarbon-Bearing Basins of the South China Sea Area." In Valencia, ed., *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development* (1981); Valencia, *Southeast Asian Seas: Oil under Troubled Waters: Hydrocarbon Potential, Jurisdictional Issues, and International Relations* (1985) pp. 81-83; Johnston and Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (1991) pp. 121-122.

35 Garver, "China's Push through the South China Sea: The Interaction of Bureaucratic and National Interests," 132 *China Q.* (1992) p. 1015. *Xinhua* Press, Beijing, 31 December 1988. Cited from Thomas, "The Spratly Islands Imbroglio: A Tangled Web of Conflict," in *International Boundaries and Boundary Conflict Resolution 1989 Conference Proceedings* (1990) p. 421.

reserves in three offshore fields - Nido, Matinloc, and Cadlao." The mission report also suggested that "there is a small chance that one more of the gigantic off-shore reefs would turn out to be oil-bearing and add one billion barrels or more to reserves."[36]

2.3. FISHERY RESOURCES

As regards the living resources, the South China Sea is one of the most important areas for commercial fisheries in the world oceans. In this region, shared stocks, such as scads and mackerels, and highly migratory species, such as tuna, are the most common and important commercial stocks. In 1988, 9.5% of the world's marine fisheries catch was from the Southeast Asian region. The total production of marine catch in the whole area of the South China Sea showed a steady increase from 6,664,000 tons in 1984 to 8,291,000 tons in 1989.[37]

There is sufficient evidence in the fishing activities of Southeast Asia to suggest that there are rich fishing grounds. Organic production and nutrient levels are generally high in coastal areas, especially around river mouths.[38] For example, the discharge from the Mekong River makes the southern portion of the South China Sea a very rich fishing ground, stretching from the Gulf of Siam to Singapore. Similarly, the

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36 Ferndandez, *supra* note 27, p. 75.

37 Isa and Noordin, *supra* note 6, p. 4.

38 Ferndandez, *supra* note 27, p. 3.

rivers flowing through the volcanic areas of Sumatra and discharging into the Malacca Straits also encourage the growth of fish nutrients and, therefore, fish stocks.[39]

Inevitably, such abundant fishery resources have a deep influence on the Southeast Asian people's life, as it provides a source of food, is a major component of the economy, and a source of employment. <Table 1> shows the consumption of fish for each of the littoral states in 1989. Except for China and Kampuchea, the per capita consumption of fish per year in Southeast Asia countries is equal to or above the world average. Compared with developed countries, the per capita supply of South China Sea littoral states is also more than that of developed countries. In addition, fish is the single most important source of animal protein for the people in this region. More than one-half of the total intake of animal protein by the average Southeast Asian person comes from fish.[40]

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39 Leng, *supra* note 28, p. 31-32.

40 Tansubkul and Fung-wai, "The New Law of the Sea and Development in Southeast Asia," 23 *AS* (1983) p. 868.

Table 1 Consumption of Fish in the Southeast Asia Area, 1989

	Fish for Food Supply(mt)	Population (thousands)	Per Capita Supply(kg/year)
Brunei	7,703	249(3.1%)*	30.9
China	9,540,257	1,085,958(1.5%)	8.8
Indonesia	2,519,377	177,437(2.1%)	14.2
Kampuchea	70,934	7,849 --	9.0
Malaysia	474,648	16,988(2.5%)	27.9
Philippines	2,012,622	59,456(2.4%)	33.9
Singapore	78,350	2,648(1.7%)	29.6
Taiwan(1989)	966,900	19,990(1.1%)	48.4
Thailand	1,126,838	54,124(1.7%)	20.8
Vietnam	833,036	63,895(1.9%)	13.0
Developing Countries	34,948,010	3,878,595	9.0
Developed Countries	33,148,192	1,234,959	26.8
World	68,096,202	5,113,554	13.3

* Figures in parentheses represent the population growth rate.

Sources: FAO, FAO Yearbook: Fishery Statistics, Commodities, Vol. 71 (1990) pp. 307-310.

Council of Agriculture, Taiwan, *Taiwan Food Balance Sheet* (1990).

In addition, fisheries also play an important role in Southeast Asian states' economies. Highly valued fish commodities such as tuna and shrimp are the major commodities exported from the region, primarily to Japan and the US. To put the fishery commodities exports of the ASEAN member states into perspective, in 1987, Thailand ranked seventh in global fish exports, Indonesia ranked twentieth, Singapore ranked twenty-seventh, the Philippines ranked thirtieth, and Malaysia ranked thirty-

fourth.[41] Moreover, the value of the fish catch to the Southeast Asian fisherman generally accounts for in excess of 2.5% of gross national product (GNP) and may exceed 5% in some cases, compared with the situation in many developed countries where the equivalent value is 1% or less.[42]

Given the importance of the fishery activities for the Southeast Asian people, we, therefore, have to examine the condition of fishery resources in this region.

The fishery activities in this region can be divided into two distinct sub-sectors, namely coastal and deep-sea fisheries. Fisheries in the deep-sea region are generally less diverse than in the coastal waters. The high diversity of resources, and low dominance of any species, or species group, result in non-targeted, multi-species type fisheries. In the demersal sector, for instance, a single haul could include up to 200 species. A similar situation exists in the Gulf of Thailand and Malaysian waters.[43] Coastal pelagic fish is caught at the coastal areas of the central Philippines, the Gulf of Thailand, the Gulf of Tonkin, west coast of China, along the coasts of Vietnam, Hainan Island, Mindoro Island, Palawan Island, coastal areas of Sarawak and Brunei, Natuna Island and coastal areas of Taiwan.[44]

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41 FAO, *FAO Yearbook: Fishery Statistics, Commodities*, Vol. 65 (1987) p. 26.

42 Marr, *Fishery and Resource Management in Southeast Asia* (1976) p. 10.

43 Isa and Noordin, *supra* note 6, p. 4.

44 Morgan and Valencia, *supra* note 6, p. 36.

As to the pelagic fisheries, various marine species are distributed throughout the South China Sea. The main species include the coastal tunas (*Euthynnus, Thunnus* and *Auxis spp.*), mackerels (*Rastrelliger spp.*), scads (*Decapterus spp.*), king mackerels (*Scomberomorus spp.*), anchovies (*Stolephorus spp.*), sardines (*Sardinella spp.*) and carangids. Pelagic fisheries are the most important of all in the South China Sea. Large tuna species, such as skipjack, are taken in the deeper-water areas, and smaller species are taken in the shallow-water areas.[45]

As mentioned above, most of the fishery resources in the South China Sea area are either shared stocks such as scads and mackerels that migrate across the EEZs of more than one coastal state, or highly migratory species, especially tuna, whose migratory patterns sometimes cover a vast area of the ocean. Other commercial stocks also include sardines, trevallies, shrimps and prawns. Common stocks of scads and mackerels are believed to occur along the coasts of the Gulf of Thailand and the eastern region of the South China Sea. The tunas that are found in the Philippine and Indonesian waters are thought to be from the same stocks that swim through the waters of Micronesia, Papua New Guinea, and farther east. Other stocks can be found along the coastlines of the coastal states in the region.[46]

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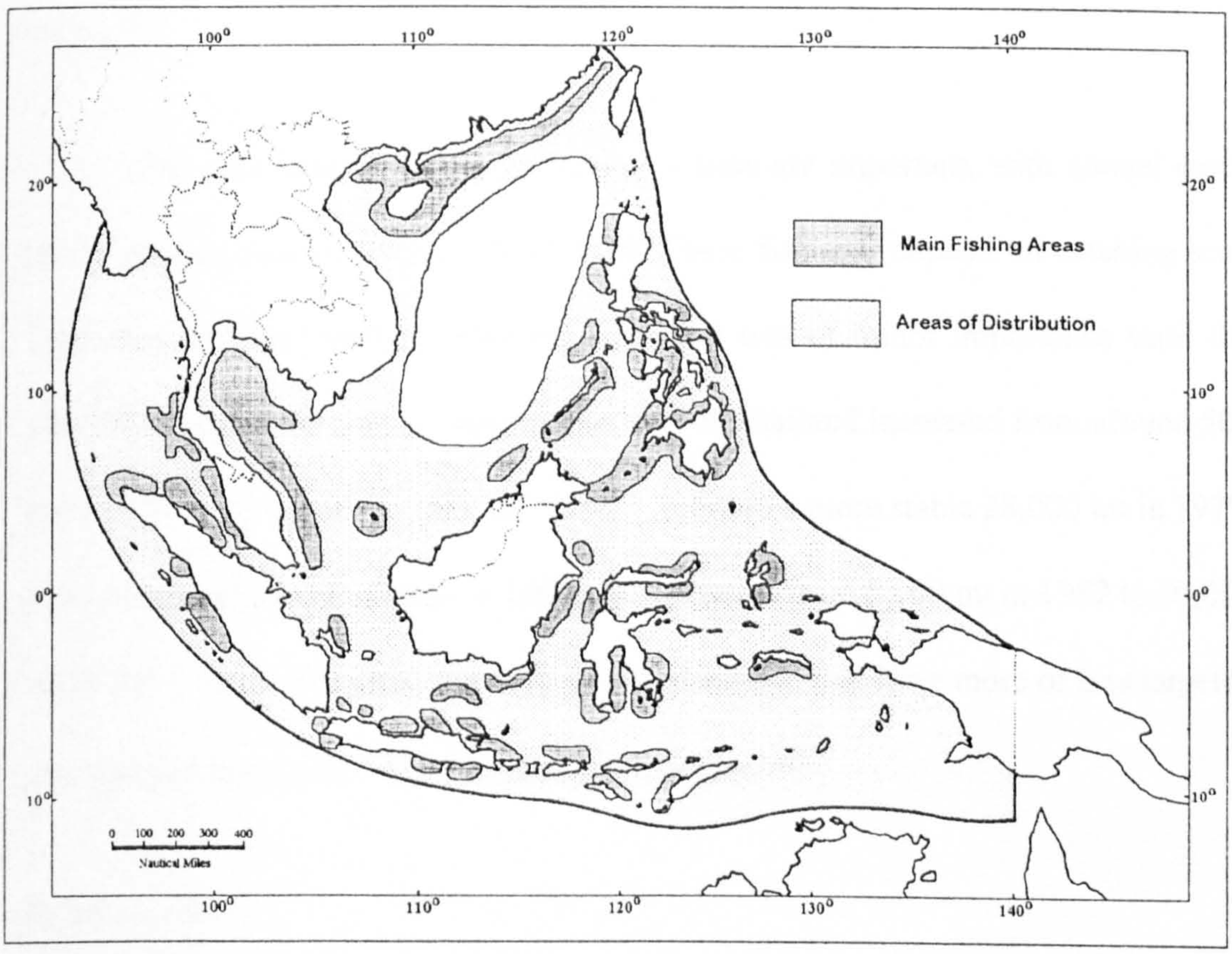
[45] Isa and Noordin, *supra* note 6, pp. 4-6; Dwiponggo, "Project Proposal on Regional Fisheries Stock Assessment in the South China Sea" (1993) p. 1.

[46] Christy, *Law of the Sea: Problems of Conflict and Management of Fisheries in Southeast Asia* (1978) p. xiv.

Map 4 Geographic Distribution: Scads



Source: Isa and Noordin, "The Status of the Marine Fisheries in the South China Sea," p. 71.

The following discussion provides more detailed information about these fishery resources:

A. Scad

Four fishing areas are recognised in the South China Sea area: they are the Philippine waters, Gulf of Thailand, Malaysian waters, and Indonesian waters.<See Map 4> Most of the catches were reported as combined catches of different scads and thus added

difficulty to the assessment of distribution and productivity by each species in the region.[47]

The scad fisheries in the Philippine waters are important, with annual catch levels varying around 209,821 mt in 1989. These fisheries depend on catching scad when they are immature. In Thailand, the scad was of minor importance until the mid-1970's, when the annual catch in the Gulf of Thailand increased from around 500 mt in 1972 to a peak of 131,000 mt in 1977, it fell to a more stable 28,000 mt in 1979. The annual catch level of scad in Malaysia increased from 5,000 mt in 1982 to 30,000 mt in 1991. As to Indonesia, the only pelagic fisheries that have more or less targeted one 'species' are those exploiting scad and mackerel.[48]

B. Mackerel

Similar to scads, the information about mackerels is incomplete. There are problems regarding species identification, catch statistics, and life history, as well as assessments of the stocks of mackerels in the area. Nonetheless, the information provided by the South China Sea Program (SCSP) Workshop perhaps allows more understanding of these resources than that of scads.[49] To assess the status of the stocks, the SCSP Workshop on Biology and Resources of Mackerels proposed a subdivision of the

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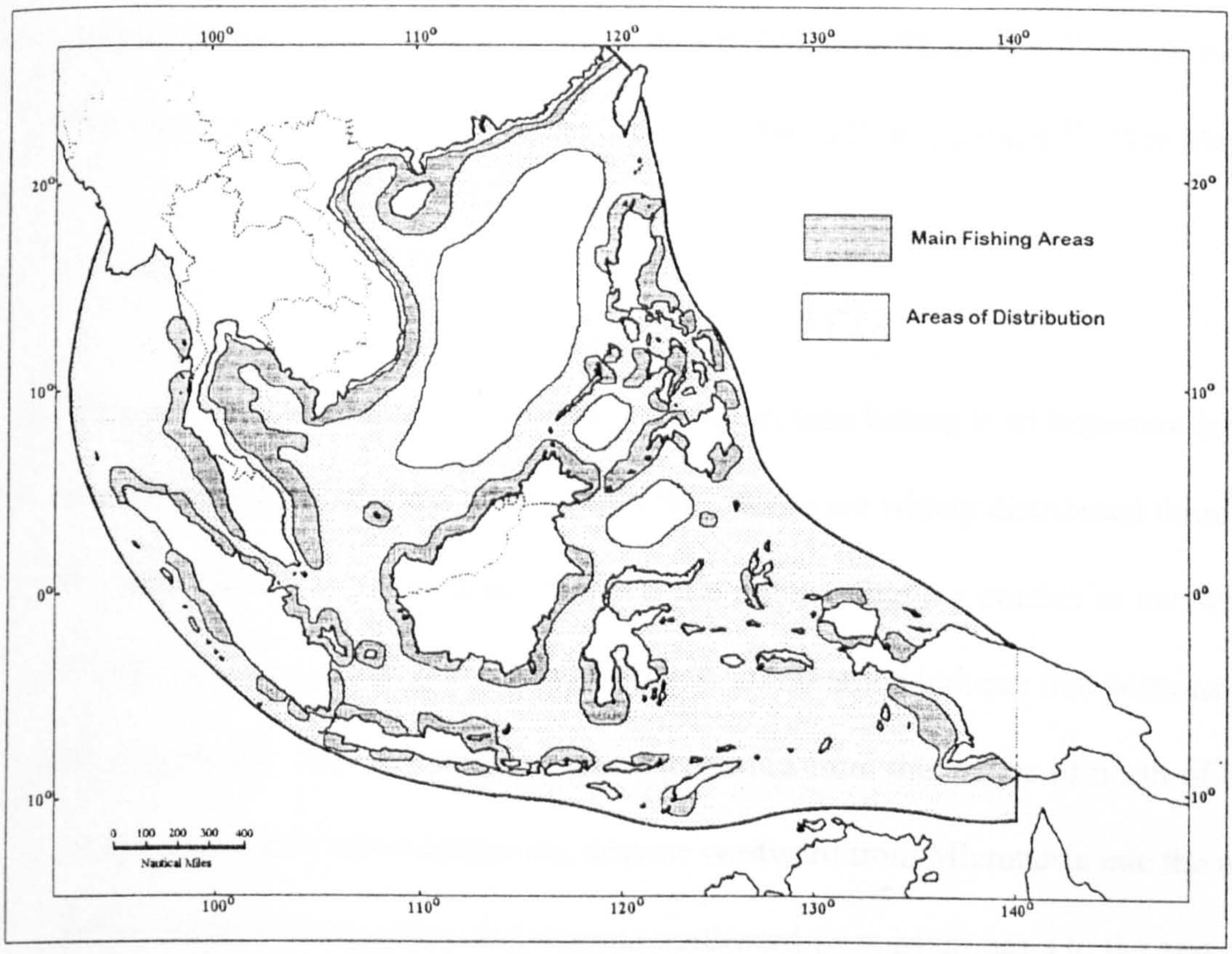
47 Hongskul, "The Allocation of Scads and Mackerels," in Christy, *ibid.*, p. 1.

48 Isa and Noordin, *supra* note 6, p. 8.

49 Hongskul, *supra* note 47, p. 4.

Map 5 Geographic Distribution: Mackerels



Source: Isa and Noordin, "The Status of the Marine Fisheries in the South China Sea," p. 70.

South China Sea area into eight local units.[50] The preliminary assessments based on the available data indicate that increase on mackerel catch can be expected from the region.[51]

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50 SCSP, *Report of the Workshop on the Biology and Resources of Mackerels (Rastrelliger spp.) and Round Scads (Decapterus spp.) in the South China Sea*, Part I, South China Sea Fisheries Department and Co-ordinating Program, 1978, SCSP/GEN/78/17.

51 Hongskul, *supra* note 47, p. 5.

Many traditional fishing grounds for mackerels, however, show signs of overexploitation, particularly in the northern Malacca Strait, the Western coast of Peninsular Malaysia, and the Western coast of the Gulf of Thailand.[52] <See Map 5>

C. Tuna

Owing to its abundant production and high value, tuna fishing is an important industry for the littoral states of the South China Sea. Tunas are widely distributed throughout the South China Sea and larger Indo-Pacific region. Tagging studies in the Western Pacific Ocean conducted by the South Pacific Commission indicate that portions of the western Pacific skipjack stocks migrate westward from the waters of north of Papua New Guinea into eastern Indonesia, migrate westward from Micronesia into the waters of the southern Philippines, and migrate northward from Micronesia to the east of the Philippines towards Taiwanese waters.[53]<See Map 6>

A more speculative study of skipjack migration suggests that skipjack may also migrate north from Philippine waters east of Taiwan into Japanese waters, and may move eastward from eastern Indonesia waters into the waters north of Papua New Guinea.[54]

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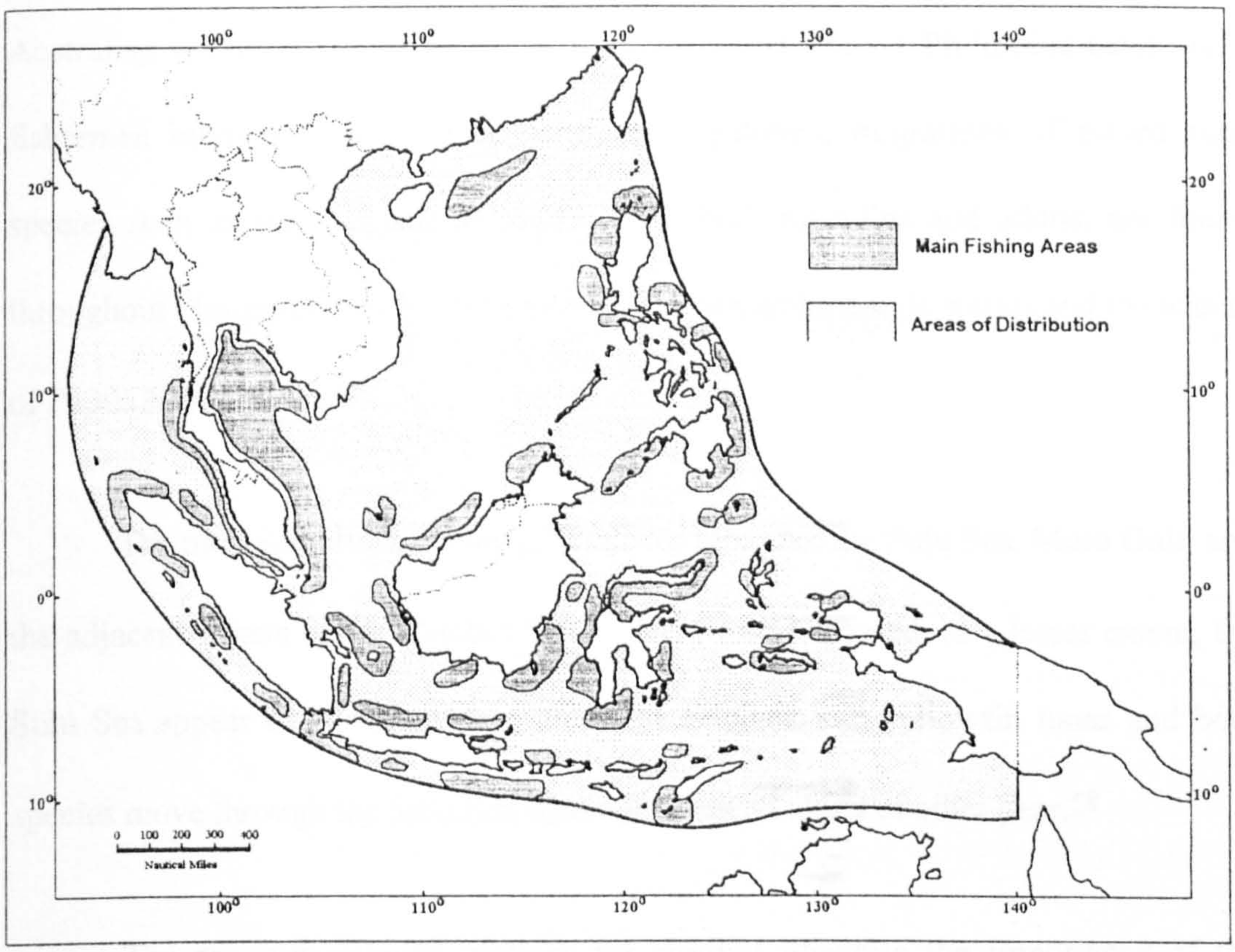
52 *Ibid.*

53 Morgan and Valencia, *supra* note 6, pp. 58, 61; Cf. Bardach and Matsuda, "Fish, Fishing, and Sea Boundaries: Tuna Stocks and Fishing Politics in Southeast Asia and the South Pacific," 4(5) *GeoJournal* (1980) pp. 467-469.

54 Morgan and Valencia, *ibid.*

Map 6 Geographic Distribution: Tunas



Source: Isa and Noordin, "The Status of the Marine Fisheries in the South China Sea," p. 76.

Based on changes in hooking-rates and size of catch, it has been speculated that yellowfin tuna migrate in and out of southern Philippine waters moving to and from the central portions of the South China Sea. They may also migrate in the Indian Ocean from the Bay of Bengal south along the Andaman and Nicobar Islands, and southeast and northeast along the Indonesian archipelagic waters, moving in and out of the waters of eastern Indonesia and northern Australia.[55]

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55 *Ibid.*

As for bluefin tuna, they are also reported to migrate northward from Australian waters into eastern Indonesian waters. Based on Philippine catch data, fishermen interviews, and larval distribution patterns, migrations of mixed tuna species such as skipjack and yellowfin tuna, both juveniles and adults, are found throughout Philippine waters south into Indonesian archipelagic waters and the waters of Papua New Guinea.[56]

The most important fishing grounds for tunas are the Sulu Sea, Moro Gulf, and the adjacent waters of the Celebes Sea.[57] The Moro Gulf and, to a lesser extent, the Sulu Sea appear to be the nursery areas for skipjack and yellowfin tunas and both species move through the Sulu Sea where they spend about another year.[58]

The above-mentioned motives for conflict illustrate the importance of the South China Sea, both in politics and economics. In this respect, it is understandable that the littoral states would like to claim all or part of the islands in this area. Accordingly, their claims inevitably produce conflicts. However, in the post-cold war era, conflict or confrontation is no longer the means to solve disputes. This tendency is further strengthened by the inter-dependent economic relations and the emphasis on peaceful settlements of disputes. We shall look at these developments in turn in the following section.

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56 *Ibid.*

57 Aprieto, *Fishery management and Extended Maritime Jurisdiction: The Philippine Tuna Fishery Situation,* Research Report No. 4 (1981) p. 8.

58 Simpson and Chikuni, *Progress Report on Fishing for Tuna in Philippine Waters by FAO Chartered Purse Seiners*, SCS/GEN/77/11, p. 102.

3. LITTORAL STATES' MARITIME CLAIMS

3.1. CHINESE MARITIME CLAIMS

Being a land empire, 'China' was considered by the ancient Chinese Emperors to be the centre of the world, and all the land and oceans surrounding it to be their domain. Accordingly, the term 'territorial sea' is not a native term for Chinese people, but one which comes from the West.[59]

Although some early provisions concerning China's jurisdiction over adjacent sea areas can be found in the agreements which the Chinese Ching Dynasty (1644-1911) concluded with a number of western countries, the term 'territorial sea' was not clearly presented in these agreements. For example, Article 26 of the Sino-American Trading Agreement (1844) refers to "... the waters over which the Chinese government exercise jurisdiction ...";[60] Article 26 of the Sino-Norwegian Trading Agreement (1847) refers to "... the coast of China";[61] and Article 19 of the Sino-Anglo Tientsin

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59 See debate between Grotius's *Mare Liberum* and Seldon's *Mare Clausum,* in Chapter 2, notes 1-3 and the accompanying text. Also Huang, *China and Its Territorial Sea* (1970) p. 2; Fitzgerald, *Europe and China: An Historical Comparison,* Annual Lecture delivered to Australian Humanities Research Council, November 1968 (1969) pp. 8-9.

60 *Treaties and Conventions between China and Foreign States,* Vol. 1, 2nd Edition (1917) pp. 67-68.

61 *Ibid.*, Vol. 2, pp. 58-59.

Treaty (1858) speaks of "... within the Chinese waters...".[62] However, there is no further explanation or definition about those terms.

During the Ching Dynasty, the official attitude toward the breadth of territorial sea was obscure. There is, however, an important provision in the 1899 Sino-Mexican Treaty of Friendship, Commerce and Navigation which stipulated:[63]

> Article 11
> The two contracting parties agree upon considering a distance of three marine leagues, measured from the line of low tide, as the limit of their territorial waters for everything relating to the vigilance and enforcement of the Custom-house Regulations and the necessary measures for the prevention of smuggling.

This treaty implied three things: First, the very use of the term 'territorial waters' shows the then Chinese government acknowledged the concept of territorial waters; Secondly, the then Chinese government recognised the breadth of territorial sea and the method of measuring it, which shows the government had accepted the then current general rules of international law related to the law of the sea; Thirdly, the Chinese government understood part of the territorial sea functions.[64]

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62 *Ibid.*, Vol. 1, p. 410.

63 Hertslet, ed., *Hertslet's China Treaties*, Vol. I, 3rd Edition (1908) pp. 403-404.

64 Compare with another case concerning a peace treaty between China and Prussia, as a result of which China secured Prussian surrender of Danish vessels, which had been seized in China's 'inner ocean'. See Greenfield, *China's Practice in the Law of the Sea* (1992) p. 16.

A. THE REPUBLIC OF CHINA

(A) TERRITORIAL SEA CLAIM

In 1911, the year that the Ching Dynasty was overthrown by Dr. Sun Yat-Sen, the ROC Ministry of Marine Force, taking national security into consideration, suggested that[65]

> According to international practice, the limitation of territorial sea is three marine miles. This is correspondent to the range of cannon-shot[66] used to be. Nevertheless, the more progressive of science is, the longer the range of cannon-shot will be. In fact, the most powerful cannon can reach ten marine miles. Consequently, in order to protect our rights, the width of our territorial sea should be extended to this range.

But the ROC central government offered no clear response to the Ministry's suggestion.

In May 1924, about one hundred Japanese fishing boats were engaged in fishing along the coast of Shantung Province, China. They even destroyed the nets and equipment of the nearby Chinese fishermen. The Chinese government entered into negotiations with the Japanese government over this issue, but the Japanese claimed that their boats were fishing on the high seas, and that they were not intruding in the Chinese territorial sea. The situation worsened during 1929-1931 and the local

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65 *Files on Foreign Relations*, Vol. 31, No. C-1-6 (10 July 1911).

66 The Dutch jurist Bynkershoek propounded the cannon-shot doctrine that the power of the territorial sovereign extended to vessels within the range of cannon mounted on the shore. During and after the Napoleonic wars the British and American prize courts translated the cannon-shot rule into the three-mile rule. See Brownlie, *Principles of Public International Law,* 4th edition (1990) p. 182; O'Connell, *The International Law of the Sea,* Vol. 1 (1982) pp. 124-129; Kent, "The Historical Origins of the Three-Mile Limit," 48 *AJIL* (1954) pp. 537-553; *The Anna* (1805) 165 E.R. 809.

governments of the coastal provinces requested the central government to establish the territorial sea scheme and settle upon its breadth.[67]

At the Hague Conference on Codification of International Law of 1930, the ROC, with nineteen other states, took the position that the breadth of the territorial sea should be three nm, measured from the low-water marks along the coast, and that within that area it enjoyed full sovereignty, subject to the right of foreign vessels to innocent passage.[68]

The breadth of the territorial sea was probably the most controversial topic considered by the 1930 Hague Conference. General agreement on the law of the sea was reached at the Conference, such as the high seas being free for the use of all; a narrow belt, generally three nm in width, of territorial sea was subject to the sovereignty of the coastal state; and a contiguous zone was recognised for the control of sanitary, defence, immigration and smuggling problems.[69]

Taking into account national security, the livelihood of fishermen, and in accordance with its position in the Hague Conference, the ROC government declared the breadth of territorial sea to be 3 nm. In addition, it also declared there to be an

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67 Lee and Chu, *History of Chinese Fishery* (1970) pp. 188-209.

68 24 *AJIL* (1930) Supplement, pp. 234-235, 254; Hackworth, *Digest of International Law* (1940) p. 628; cf. Colombos, *International Law of the Sea*, 6th rev. Edition (1967) p. 99; Wu, ed., *China - A Handbook: Theory and Practice of International Law with Respect to Selected Issues* (1973) p. 400.

69 24 *AJIL* (1930) Supplement, p. 253.

additional zone of 12 nm, measured from the territorial sea baselines, with which there existed jurisdiction with regard to the arrest of smuggling with Act No. 1612 of 20 April 1931.[70]

Following on the international expansion of maritime jurisdiction after the Truman Proclamations in 1945, the ROC government also became aware of the development of the law of the sea and took consideration of the 12 nm territorial sea. The Chinese delegate to the UN International Law Commission,[71] Mr. Shuhsi Hsu, said that the 12 nm territorial sea would meet the demands of most states.[72]

Because of the wide divergence of opinion concerning the breadth of the territorial sea in international practice, and although UNCLOS I successfully drafted four conventions on the law of the sea,[73] the Convention on the Territorial Sea and the Contiguous Zone was silent on the issue of the breadth of the territorial sea.[74] Article 6 of the Convention merely stipulates that

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70 *Gazette of the Ministry of Communications*, No. 244, 9 May 1931, pp. 1-2.

71 Although the PRC was established in 1949, the ROC still kept its membership status in the UN and other related organisations till 1971. The ROC assigned all Chinese representatives to the UN and other related organisations. See Chapter 3, Sub-Section 3.2.

72 *YILC* (1952) Vol. 1, p. 153, para. 80; p. 158, para. 54; and (1955) Vol. 1, p. 154, para. 61; pp. 172-173, para. 15; p. 186, para. 43.

73 These Conventions are the Convention on the Continental Shelf, the Convention on the Fishing and Conservation of Living Resources of the High Seas, the Convention on the Territorial Sea and Contiguous Zone, the Convention on the High Seas. The ROC is one of the signatories of these four Conventions.

74 UNCLOS I, *Official Records*, Vol. 3 (1958) p. 249.

> The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

The 1960 UNCLOS II also failed to produce any consensus on this matter.[75]

Following the beginning of UNCLOS III from 1973, the issues of the breadth of territorial sea, the establishment of the EEZ, and several other important matters were central elements of the discussions. The ROC government anticipated the development of the international law of the sea and the impact on its fishing industry. Accordingly, on 9 December 1974, the ROC Executive Yuan[76] held a meeting on the issues of law of the sea with other related authorities. Following this meeting, an ad-hoc committee, the Committee on the Territorial Sea Issues, was established to study those issues under the lead of the Ministry of Interior.

The problems presented to the ROC by these international developments in the law of the sea are peculiarly difficult because of the adverse diplomatic situations confronting it. Not only was the ROC excluded from UNCLOS III, but also it did not have diplomatic relations with many countries. In the face of these difficulties merely to negotiate any solution to such disputes that arise from time to time makes it

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75 Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Sea," 54 *AJIL* (1960) p. 751.

76 The Executive Yuan is the highest administrative organ of the ROC in Taiwan, and is lead by the Premier.

desirable for the ROC to take a cautious position to claim rights or privileges for itself.[77]

Nevertheless, the ROC was still threatened by other coastal states' extending territorial sea and establishing EEZs, especially after the Philippine President Marcos declared Presidential Act No. 1599 which established an EEZ on 11 June 1979.[78] The Philippine Presidential Act No. 1599 had a tremendous influence on Taiwan. After serious consideration, the ROC Executive Yuan declared the extension of its territorial sea from 3 nm to 12 nm and the establishment of the 200 nm EEZ on 6 September 1979. The Declaration was as follows:[79]

> 1. The territorial sea of the Republic of China shall be measured from the baselines and shall extend to the outer limits of the water area of twelve nautical miles from such baselines.
> 2. The exclusive economic zone of the Republic of China shall be measured from the baselines from which the territorial sea is measured and shall extend to the outer limits of the water area of two hundred nautical miles from such baselines.
>
> A. The Republic of China shall have in the exclusive economic zone sovereign rights for purposes of exploitation, conservation and utilisation of the natural resources, and such jurisdiction the exercise of which are recognised under international law.

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77 Dellapenna and Wang, "The Republic of China's Claims Relating to the Territorial Sea, Continental Shelf, and Exclusive Economic Zones: Legal and Economic Aspects," 3(2) *Boston College ICLR* (1980) p. 357. Cf. *infra* note 91 and its text.

78 Smith, *Exclusive Economic Zone: An Analysis and Primary Document* (1986) pp. 369-370. For the Philippine establishment of EEZ, see *infra* Sub-Section 3.3.C.

79 Document released at the Government Information Office press conference, 6 September 1979.

B. Where the exclusive economic zone of the Republic of China extends over any part of the exclusive economic zones as proclaimed by other states, the boundaries shall be determined by agreement between the states concerned or in accordance with generally accepted principles of international law on delimitation.
C. Other states may enjoy in the exclusive economic zone of the Republic of China the freedom of navigation and overflight and of the laying of submarine cables and pipelines, and engage in such other activities with respect to navigation and communication as permitted by international law.

3. The sovereign rights enjoyed by the Republic of China over the continental shelf contiguous to its coast as recognised by the Convention on the Continental Shelf of 1958 and the general principles of international law shall not be prejudiced in any manner by the proclamation of the present exclusive economic zone or the establishment of such zones by any other state.

This Declaration was submitted to the President Chiang Ching-Kuo, and was approved by Presidential Decree No. 5046 of 8 October 1979 and ordered to be executed. The Presidential Decree indicated the following three orders:[80]

1. The territorial sea of the Republic of China shall be measured from the baselines and shall extend to the outer limits of the water area of twelve nautical miles from such baselines.
2. The exclusive economic zone of the Republic of China shall be measured from the baselines from which the territorial sea is measured and shall extend to the outer limits of the water area of two hundred nautical miles from such baselines.
3. The sovereign rights enjoyed by the Republic of China over the continental shelf contiguous to its coast shall not be prejudiced in any manner by the proclamation of the present exclusive economic zone or the establishment of such zones by any other state.

This Declaration inevitably creates an overlapping area with the Philippines in the Bashi Channel. Besides, owing to its claim on the sovereignty of the Paracel Islands and the Spratly Islands, Taiwan also has overlapping claims with Malaysia, the

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80 *Gazette of the Presidential Office*, No. 3575, 10 October 1979, p. 2.

Philippines, the PRC, and Vietnam in the South China Sea region.[81] There is no specific delimitation method mentioned in the declaration, but, according to paragraph 2(B) of the declaration, "the boundaries shall be determined by agreement between the states concerned or in accordance with generally accepted principles of international law on delimitation." This illustrated the ROC government's aspiration on negotiating with those conflicting states.

(B) CONTINENTAL SHELF CLAIM

Although the continental shelf had been an important issue in the field of international law of the sea and an international practice since the Truman proclamations, the scholars and the government of the ROC did not pay much attention to this topic. Nonetheless, it is worthwhile examining the Taiwanese fishery industry's attitude toward the continental shelf.

When the 1956 International Law Commission Draft Articles on the Law of the Sea were sent to the member states of the UN for comments, the Taiwanese fishery industry expressed the view that the sea area of the continental shelf should be considered a part of the territorial sea and the coastal state should have the preferential right and duty with respect to the living resources therein.[82] However, the ROC

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81 See *infra* Section 4.

82 "Our Fishing Industry's Recommendation on the Law of the Sea," 74 *Yu-Yo (Fishermen's Friends)* (August 1957) p. 13; Huang, "The Republic of China and the Regime of Continental Shelf," 1 *Man and Society* (August 1973) pp. 50, 56.

government did not adopt this view and made no comments on those articles concerning the regime of the continental shelf.[83]

The ROC signed the 1958 Geneva Convention on the Continental Shelf on 29 April 1958 without reservation. Nonetheless, no action was taken to ratify the Convention until the late 1960's. This attitude did not last after the release of the UN Economic Commission for Asia and the Far East report. In that report, it is said that "a high probability exists that the continental shelf between Taiwan and Japan may be one of the prolific oil reservoirs in the world."[84] This report caused a great sensation among all the relevant coastal states abutting the continental shelf in the region, including the ROC. Soon after this, the ROC government first asserted its claim to the continental shelf adjacent to China. On 17 July 1969, the Executive Yuan of the ROC issued a declaration as follows:[85]

> The Republic of China is a State signatory to the Convention on the Continental Shelf which was adopted by the UN Conference on the Law of the Sea in 1958. For the purposes of exploring and exploiting natural resources and in accordance with the principles embodied in the said Convention, the Government of the Republic of China declares that it may exercise its sovereign rights over all the natural resources of the seabed and subsoil adjacent to its coast outside its territorial sea.

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83 UN Doc. A/CONF.13/5/Add 2, 29 January 1958.

84 Emory, et al., "Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea," 2 *Technical Bulletin*, Technical Advisory Group Report (1969) pp. 39-40.

85 Chiu, "Chinese Contemporary Practice and Judicial Decisions Relating to International Law, 1968-1970," 7 *The Annuals of the Chinese Society of International Law* (1970) p. 84.

In early 1970, the Executive Yuan decided that in ratifying the Convention, the ROC should make the following reservation to Article 6:[86]

> With regard to the determination of the boundary of the continental shelf as provided in Paragraphs 1 and 2 of Article 6 of the Convention, the Government of the Republic of China considers:
> 1. that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of the natural prolongation of their land territories; and
> 2. that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.

With respect to the reservation that the ROC made, its main point was on the Tiao-yu-tai issue with Japan.[87] Both the ROC and Japan claim sovereignty over the Tiao-yu-tai Islets, which are situated on the edge of the continental shelf extended from the China mainland and Taiwan. From the Chinese view, both the PRC and the ROC, these islands are continental, appertaining to Taiwan, as distinct from the oceanic Ryukyus in the east, therefore claiming a continental shelf on the basis of natural prolongation would be favourable to them.[88] On the contrary, the Japanese

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86 *Gazette of the Legislative Yuan*, Vol. 59, No. 64, 22 August 1970, p. 3.

87 Tiao-yu-tai Islands are also known as Senkaku Gunto in Japanese. About the discussion of the issue of Tiao-yu-tai Islands, see Park, "Oil under Troubled Waters: The Northeast Asia Sea-Bed Controversy," in *Idem, East Asia and the Law of the Sea* (1983) p. 1; Greenfield, *supra* note 64, pp. 127-149; Johnston and Valencia, *supra* note 34, pp. 104-115; Ma, "Foreign Investment in the Troubled Waters of the East China Sea," 1 *CYILA* (1981) p. 35; *Idem, Legal Problems of Seabed Boundary Delimitation in the East China Sea* (1984).

88 However, the importance of the natural prolongation principle had been played down in the later cases. See *Tunisia-Libya* Case, para. 68. For discussion, see Evans, *Relevant Circumstances and Maritime Delimitation* (1989) pp. 107-111.

government takes the position that the status of Tiao-yu-tai islands should be decided by median line principle which would place those islands on their side. By denying that exposed rocks or islets could be used as a basis for claiming continental shelf, the ROC apparently was preparing its second line of defence, i.e. even if the ROC lost in the territorial dispute over the Tiao-yu-tai, it would still deny Japan's right to claim the continental shelf for those islets. On the other hand, it must be pointed out that such a reservation would have had the undesirable effect of weakening the ROC claim for a continental shelf in respect of its South China Sea mid-ocean islands, namely, the Paracel and Spratly Islands.[89]

The Legislative Yuan ratified the Convention with the proposed reservation and the ROC President issued an instrument of ratification on 23 September 1970, which was deposited with the UN Secretariat on 14 October 1970.[90]

(C) EXCLUSIVE ECONOMIC ZONE CLAIM

In view of the EEZ, the ROC was reluctant to accept it at an early stage, although it had noticed the development of the EEZ in the international community. The Executive Yuan held two meetings to examine the issues of the EEZ. Both meetings concluded

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89 Chiu, *Chinese Attitude Toward Continental Shelf and its Implication on Delimiting Seabed in Southeast Asia* (1977) pp. 9-10.

90 10 *ILM* (1971) p. 452.

that it was not proper to establish an EEZ or an Exclusive Fishery Zone at that moment.

Their reasons were as follows:[91]

1. The deep-sea fishery plays an important role in the ROC fishing industry. The Government deeply wishes that other states would not establish EEZs. Therefore, the ROC Government would not establish its own EEZ;
2. When the ROC government ratified the Convention on the Continental Shelf, she declared that the delimitation of continental shelf boundary should correspond with the principle of natural prolongation of the land territory of coastal states.
3. If the ROC Government establishes EEZ, the disputes of delimitation would be arisen between it and Korea, Japan, and the Philippines. At this moment, none of those states had established any similar zone. Thus, the ROC should not establish any similar zone either.

Nonetheless, due to the Philippine Presidential Act No. 1599 of 11 June 1979,[92] the ROC government had to respond to this declaration from the Philippines.

On 6 September 1979, the ROC declared its 200 nm EEZ.[93] The declaration of EEZ was welcomed domestically, especially by the fishing industry. The general feeling at the time was that it seemed overdue, because its neighbouring states, such as Japan, Indonesia, and the Philippines, had already claimed similar zones. Thus the declaration made by the ROC government would also serve as a counter measure to protect its fishing fleets, which had often been fined or seized by neighbouring states in disputed waters. Although the brief announcement did not immediately solve the problems of delimitation and fishery disputes, it did serve the purpose of notifying the neighbouring states of its serious concern over these issues.

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91 *China Daily News* (7 September 1979) p. 3.

92 Smith, *supra* note 78, pp. 369-370.

93 *Supra* notes 79 and 80 and the accompanying text.

(D) ATTEMPTED CODIFICATIONS

A clear and unambiguous law or regulation not only can make fishery operators understand what the government's policy is, but also can clarify the fishery executives' direction when they deal with fisheries administration.

Furthermore, it might be observed that the declaration of establishment of the EEZ is one thing, while establishing and carrying out its administration is another. Having examined the ROC's establishment of EEZ and without further relevant legislation, it is easy to see its shortcomings.

The ROC government declared the extension of territorial sea and the establishment of EEZ on 6 September 1979, but there was no appropriate law or regulation to apply to these areas to regulate Taiwanese fishermen's activities with regard to exploration and exploitation, conservation and management of the natural resources within its EEZ and territorial sea. Moreover, without appropriate regulations, the relevant authorities are not authorised to visit, examine, detain, try, and punish those who intrude in the ROC's EEZ. For example, it is recorded that Japanese fishing fleets intrude in and operate in the ROC's EEZ every year. On 19 September 1984, 40 Japanese fishing vessels were found operating in the EEZ of Pen-Chia-Yu Island.[94]

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[94] Pen-Chia-Yu is an island which is located in the northeast sea area of Taiwan. The sea area around that island provides an excellent fishing ground. The Taiwanese Navy had expelled those Japanese fishing vessels. See *United Daily News* (20 September 1984) p. 5.

Due to the growing concern over the lack of jurisdiction or authority to take action in the EEZ, the ROC Ministry of the Interior convened an ad hoc committee, the Committee on Base Points and Baselines and Law of EEZ and Territorial Sea, to study and draw up those issues on 11 September 1989. This Committee was chaired by the Minister of the Interior, and constituted the staff from the Secretariat of the Executive Yuan, the Deputy Ministers of Foreign Affairs, National Defence, Justice, Economic Affairs, Communications, Council of Agriculture, Administration of Environmental Protection, and scholars.[95] After almost two years' discussion and research, this Committee produced two drafts and sent to the Legislative Yuan.[96]

On 25 June 1991, the 'Draft of the Territorial Sea and the Contiguous Zone' was promulgated by the Ministry of the Interior. The important contents of that Draft are as follows:[97]

> Article 1
> The sovereignty of the ROC extends to the territorial sea, the air space over the territorial sea as well as to its bed and subsoil.
>
> Article 4
> The territorial sea of the ROC shall be measured from the baselines and shall extend to the outer limits of the water area of twelve nautical miles from such baselines.
>
> Article 5

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95 *Taiwan Daily News* (10 September 1989) p. 2.

96 The Legislative Yuan is the highest legislative organ of the state, it exercises legislative power on behalf of the people. The function of the Legislative Yuan of the ROC is similar to the function of the Parliament of the United Kingdom.

97 *China Daily News* (22 November 1990) p. 4; *Central Daily News* (26 June 1991) p. 1. All of the draft provisions are unofficial translations.

Median line and equidistance line are the principles for delimiting the territorial sea between the ROC and its neighbouring countries which are opposite or adjacent to each other. If there is a dispute, it shall be referred to an agreement.

Article 6
All foreign ships enjoy the right of innocent passage through the territorial sea of the ROC. The innocent passage of foreign warships is in accordance with the regulations which are initiated by the Ministry of National Defence.

Article 7
Based on the reason of the national coast security and national interests, the ROC government may suspend temporarily in specified areas of its territorial sea for the innocent passage of foreign ships. The specified areas and the period of suspensory is in accordance with the regulations which are initiated by the Ministry of National Defence.

Article 9
The Ministry of National Defence shall take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

Article 10
The contiguous zone of the ROC is the water area contiguous to its territorial sea. Its width is 12 nautical miles measured from the outer limit of the territorial sea.

Article 11
The authorities shall exercise the control in the contiguous zone necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territorial sea;
(b) punish infringement of the above laws and regulations committed within its territorial sea.

Article 13
Punitive provisions concerning

(a) unable to comply with all laws and regulations about innocent passage;
(b) infringement of navigating in designated or prescribed sea lane;
(c) navigating in the temporarily suspended areas;
(d) infringement of the provisions of Article 9.

On the same day, the 'Draft of EEZ and Continental Shelf' was released as well.

The important parts in this Draft are:[98]

A. The EEZ of the ROC is an area beyond and adjacent to the territorial sea, its width is 200 nautical miles measured from the baselines from which the breadth of the territorial sea is measured.
B. The delimitation of the EEZ or continental shelf between the ROC and its neighbouring countries with opposite or adjacent coasts shall be effected by agreement on the basis of equitable principle.
C. In the EEZ and continental shelf, the ROC has all the rights for exploring and exploiting, conserving and managing the natural resources, whether living or non-living, production of energy from the water; the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.
D. The ROC government may take measures, including boarding, inspection, arrest and judicial proceedings, to ensure compliance with its laws and regulations. The Government may undertake right of hot pursuit.

The meaning of the two drafts is declarative rather than practical. Owing to the Committee's consideration that the ROC's sovereignty and jurisdiction reaches the Chinese Mainland, the baselines are drawn from the mouth of Yalu River[99] in the northeast along the coastal islands to the mouth of Peilun River in the southeast.[100] It also covers Taiwan area, Nansha Chun-Tao (Spratly Islands) in the South China Sea, and Tiao-yu-tai Islands in the East Sea. Undoubtedly, the declaration on the sovereignty and jurisdiction over Chinese Mainland and Taiwan is a reiteration of its 'One China Policy'.[101] As to the island groups in the South China Sea and the East

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98 *Central Daily News* (26 June 1991) p. 1.

99 The Yalu River is the border river between China and North Korea.

100 Peilun River is the border river between China and Vietnam.

101 About 'One China Policy', see Chapter 3, Section 3.

Sea respectively, these drafts also serve as a declaration of jurisdiction over them, because there is no sign of a resolution concerning delimitation or negotiation being reachable at the moment, even in the near future. With regard to the Spratly Islands in the South China Sea, it is well-known that there are five countries, namely China, Malaysia, the Philippines, Taiwan, and Vietnam, claiming ownership over the whole or part islands in that area.[102] As to the Tiao-yu-tai islands, China, Japan, and Taiwan claim sovereignty over them.[103] The ROC declaration of the baselines of the territorial sea and its sovereignty over those areas would help it to strengthen its position in negotiating with its neighbouring countries. Nevertheless, the shortcoming would be that it is impractical to declare the ROC's sovereignty and jurisdiction to be over the whole Chinese mainland. In fact, it is impossible for the ROC government to exercise its jurisdiction over what happened in mainland China, and vice versa.

Nonetheless, the two Drafts are still waiting for the Legislative Yuan's ratification, because the term 'law' or 'act' as used in the Constitution denotes any legislative bill passed by the Legislative Yuan and promulgated by the President.

Being a powerful distant-water fishing nation, the ROC is unique in that it has few relevant condifications concerning the law of the sea. Among the possible reasons for this are the following:

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102 See *infra* Section 4.

103 See *supra* note 87.

First, Taiwan has been isolated from the international community for decades. This made Taiwan very sensitive and hesitant when dealing with other states, especially with its neighbouring countries. This hesitation can be seen from its decisions on territorial sea and EEZ.[104]

Secondly, owing to its national policy, 'One China Policy', Taiwan is in a dilemma over making its baselines system. It is unrealistic to declare its baseline system to include the coast of Chinese mainland, because Taiwan does not have jurisdiction over that area. On the other hand, it is against its own policy if it declares the baseline system as only around the Taiwan area.

In view of such considerations, the codification of relevant acts has been seriously delayed.

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Country	TS (Date)	EEZ (Date)	FZ (Date)
Brunei	12 nm (01/01/1983)		200 nm(01/01/1983)
China (PRC)	12 nm (04/09/1958)		
Indonesia	12 nm (18/02/1960)	200 nm (21/03/1980)	
Japan	12 nm (01/07/1977)		200 nm(01/07/1977)
South Korea	12 nm (30/04/1978)		
Malaysia	12 nm (02/08/1969)	200 nm (1984)	
Philippines	Treaty Limits	200 nm (11/06/1978)	
Taiwan (ROC)	12 nm (06/09/1979)	200 nm (06/09/1979)	
Thailand	12 nm (06/10/1966)	200 nm (23/02/1981)	
Vietnam	12 nm (12/05/1977)	200 nm (12/05/1977)	

Source: UN, *Baselines: National Legislation with Illustrative Maps* (1989); UN, *National Claims to Maritime Jurisdiction: Excerpts of Legislation and Table of Claims* (1992).

B. THE PEOPLE'S REPUBLIC OF CHINA

The PRC established its territorial sea on 4 September 1958 with a Declaration on China's Territorial Sea.[105] In its declaration,[106]

> The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Tungsha Islands (Pratas Islands), the Hsisha Islands (Paracel Islands), the Chungsha Islands (Macclesfield Bank), the Nansha Islands (Spratly Islands) and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas. [brackets added]

This 12 nm territorial sea claim met with immediate rejections by the US[107] and the UK.[108] In justifying their claim, the PRC put forward three arguments.[109] Firstly, there is the assertion that the determination of the territorial limit is an exercise of sovereignty which does not require explanation or justification. The second argument is that each nation is free to determine its territorial limit because there has never been any universally recognised breadth of the territorial sea under international law. Thirdly, it argued that the three nm limit, although once commonly accepted, has long become obsolete, as shown by many countries' practice.

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105 Text reproduced in 8 *ICLQ* (1959) p. 182.

106 Declaration on China's Territorial Sea, Paragraph 1.

107 Cheng, "Communist China and the Law of the Sea," 63 *AJIL* (1969) pp. 47-48.

108 *Time* (6 September 1958) p. 6.

109 For the following three arguments, see Cheng, *supra* note 107, pp. 54-55. Cf. Greenfield, *supra* note 64, pp. 58-61.

The PRC's 1958 declaration plays an important political role in promoting its claim on territorial integrity and national defence.[110] This document is an administrative order, however, lacking the legal status of a law adopted by China's legislature. In order to repair this shortcoming, the State Oceanic Administration established an inter-departmental group to draft a new law on the territorial sea in 1984.[111] After eight years of work, the National People's Congress adopted the Law on the Territorial Sea and the Contiguous Zone on 25 February 1992.[112] Article 2 of the 1992 Law states

> The territorial sea of the People's Republic of China is the sea belt adjacent to the land territory and the internal waters of the People's Republic of China.
>
> The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands;[113] the Penghu Islands; the Dongsha Islands (Pratas Islands); the Xisha Islands (Paracel Islands); the Zhongsha Islands (Macclesfield Bank) and the Nansha Islands (Spratly Islands); as well as all the other islands belonging to the People's Republic of China. [brackets added]

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110 Fu, "*Concerning the Question of Our Country's Territorial Sea*," in Cohen and Chiu, eds., *People's China and International Law: A Documentary Study* (1974) pp. 470-473.

111 Wang and Pearse, "The New Legal Regime for China's Territorial Sea," 25 *ODIL* (1994) p. 434.

112 Text reproduced in 21 *LOS Bulletin* (August 1992) p. 24. About the analysis of the Chinese territorial sea law, see Kim, "The 1992 Chinese Territorial Sea Law in the Light of the UN Convention," 43 *ICLQ* (1994) p. 894; Wang and Pearse, *ibid.*, pp. 431-442.

113 See *supra* note 87.

On 15 May 1996, China ratified the LOSC and announced a set of straight baselines of its territorial sea.[114] According to this announcement, two things are noteworthy: Firstly, two Taiwan controlled island groups, Quemoy and Matsu, are enclosed by this baseline system.<Map 1> This would create other jurisdictional disputes between China and Taiwan. On this point, the ROC Premier stated that China's announcement is disputable and the ROC will not accept it.[115] Secondly, this set of baselines composes part of the Chinese territorial sea adjacent to the mainland and the Paracel Islands. In other words, neither Taiwan Island or Penghu Islands are included in this baseline system, nor are the Spratly Islands. This might imply that there could have been negotiation between China and Taiwan, although 'One China' is their basic policy. It also implies negotiation took place between China and other South China Sea littoral states, although China treats the South China Sea as its historic waters.

Vietnam immediately protested the Chinese announcement. The Vietnamese government issued a prompt riposte:[116]

> China's delineation of the base line in the Paracel Archipelago is a new severe violation of Vietnam's territorial sovereignty and runs counter to international law.

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114 *Xinhua* News Agency, Beijing, 15 May 1996.

115 *China Times* (16 May 1996) p. 2.

116 "Statement of Spokesperson for the Socialist Republic of Vietnam," *Voice of Vietnam*, 16 May 1996. Text reprinted at http://www.mailbase.ac.uk/lists-f-j/int-boundaries/1996-05/0017.html.

3.2. MALAYSIAN MARITIME CLAIMS

Malaysian claims can be divided into three steps. Firstly, on 2 August 1969, Malaysia proclaimed its 12 nm territorial sea system under Emergency Ordinance No. 7, 1969.[117] Section 3(1) of the Ordinance reads:

> The breadth of the territorial waters of Malaysia shall be twelve nautical miles and such breadth shall except in the Straits of Malacca, the Sulu Sea and the Celebes Sea be measured in accordance with Articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone (1958) ...

The three exceptions stated in the Section 3(1) were inserted because all three maritime areas were less than 24 nm in width separating Malaysia from another coastal state. It was felt that a solution by way of bilateral agreement was preferable.[118]

Secondly, in terms of the non-living resources of its continental shelf, the Malaysian government adopted a Continental Shelf Act in 1966 which proclaimed[119]

> 'continental shelf' means the seabed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial waters of the States, the surface of which lies at a depth no greater than two hundred metres below the surface of the sea, or, where the depth of the superjacent water admits of the exploitation of the natural resources of the said areas, at any greater depth.

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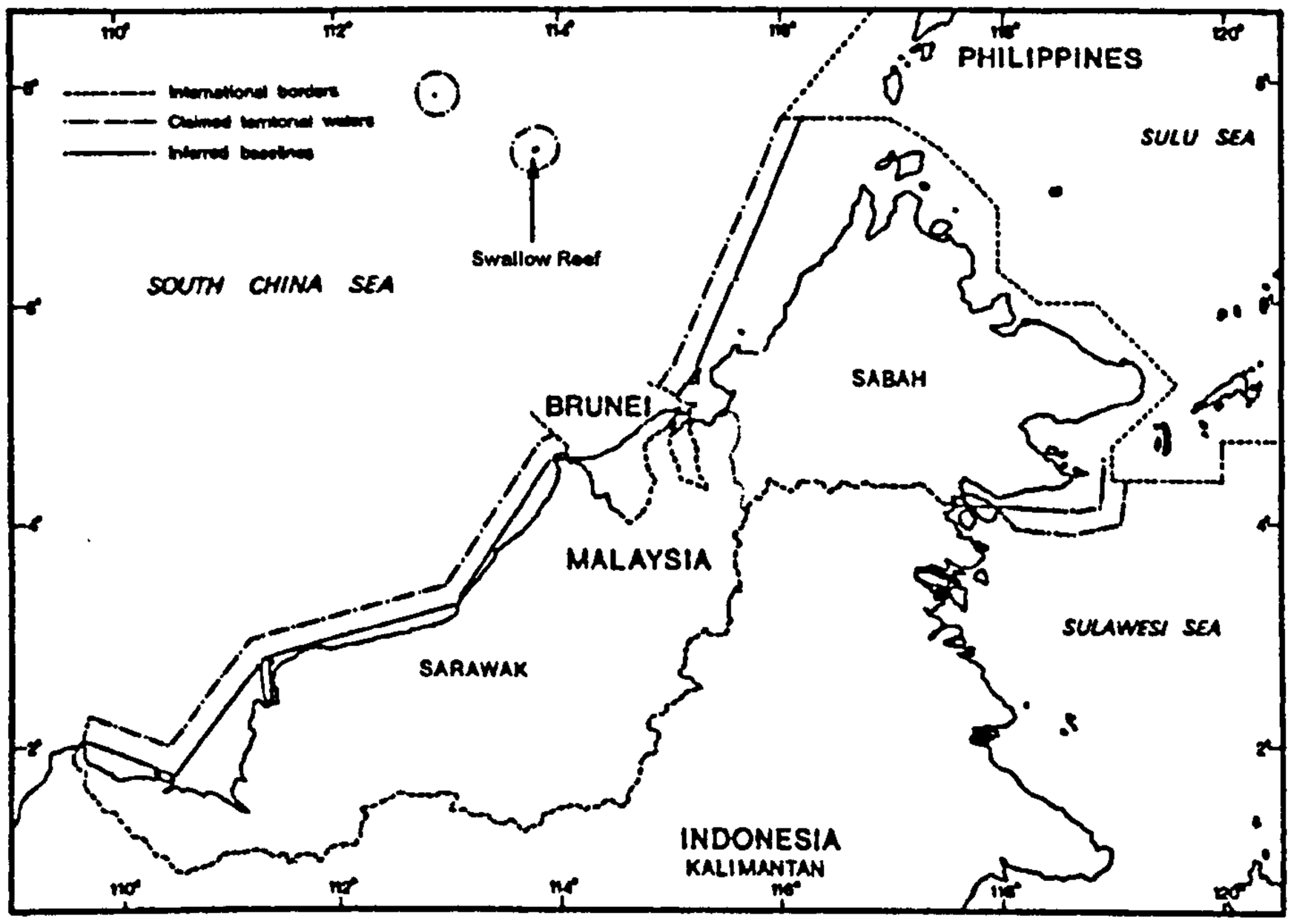
117 Emergency (Essential Powers) Ordinance No. 7, 1969. Excerpts in UN, *National Claims to Maritime Jurisdiction, supra* note 104, p. 78.

118 Tangsubkul, *ASEAN and the Law of the Sea* (1982) p. 11.

119 Text reproduced in UN, *National Legislation on the Continental Shelf* (1989) p. 152; 36 *Limits in the Sea* (revised edition, 1985) p. 111. Cf. *Keesing's* (1984) p. 32785.

Map 7 Malaysia's Baselines around Sabah and Sarawak



Source: Prescott, The Maritime Political Boundaries of the World (1985) p. 216.

Therefore, Malaysian sovereign rights over the resources in its continental shelf, beyond the territorial sea limits, freedom of navigation and overflight was still recognised, and fishing activities were not affected.[120] This situation did not change until the Malaysian government promulgated an Exclusive Economic Zone Act in 1984.[121] With this Act, the Malaysian government carried out the third step which extended its sovereign rights over the water area.

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120 Tangsubkul, *supra* note 118.

121 Exclusive Economic Zone Act 1984, ACT No. 311. Excerpts in UN, *National Claims to Maritime Jurisdiction, supra* note 104, p. 78.

Because of the stipulations in the Continental Shelf Act, Malaysia claims that some reefs of the Spratly Islands are within its continental shelf, which leads to overlapping claims with Taiwan, the Philippines, Vietnam, and the PRC.[122] <See Map 7>

3.3. THE PHILIPPINE MARITIME CLAIMS

The Philippines is composed of more than 7,000 islands, lying proximate to each other. Most of these islands are separated by distances of less than 24 miles, a few by more than 50 miles but no one island lies more than 83 miles from another.[123] As a mid-ocean archipelagic state, some of the Philippine islands lie at a distance of more than 12 nm from each other. The sea has always played an important role in the life of the Filipinos. Because of the desire for exclusive control over all resources and activities within the area enclosed by straight baselines and also national security concerns,[124] the Philippines has claimed a unique territorial sea system and had been one of the states which supported the archipelagic doctrine since the early 1950's.[125] The discussion in this section will start from the Philippine territorial sea claim.

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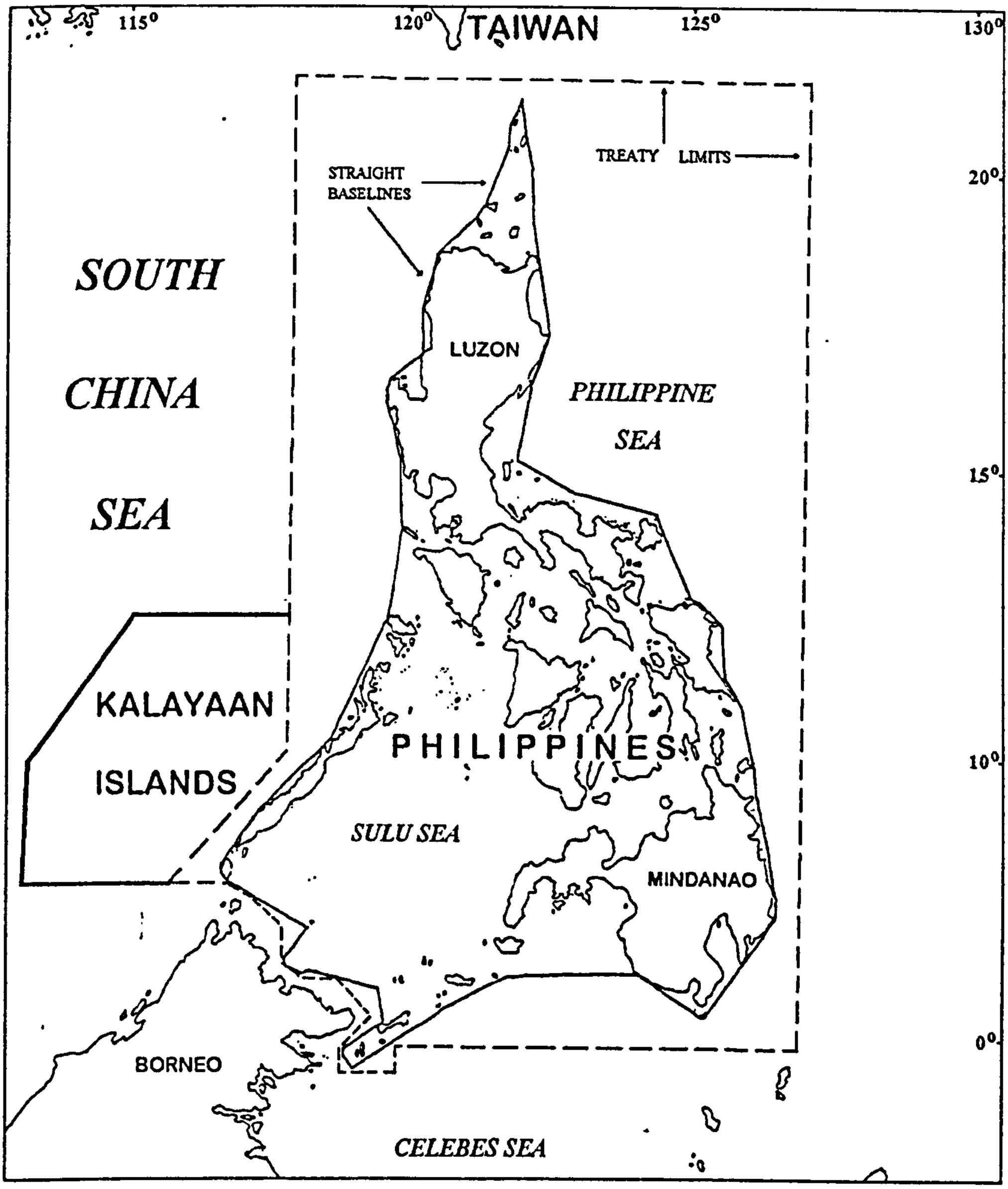
[122] Cf. *infra* Sub-Section 4.2.

[123] Mendoza, "The Base-lines of the Philippine Archipelago," 46 *Philippine Law Journal* (1971) p. 634.

[124] Dellapenna, "The Philippines Territorial Water Claim in International Law," 5 *Journal of Law and Economic Development* (1970) pp. 51-52; Mendoza, *ibid.*, pp. 632, 635.

[125] Tangsubkul, *supra* note 118, p. 6; Tolentino, *supra* note 27, p. 13. The Philippine delegates also support this doctrine at the UNCLOS III, see UN Doc. A/CONF.62/C.2/L.24/Rev.1 and UN Doc. A/AC.138/SC.II/L.46.

Map 8 The Philippine Treaty Limits and Archipelagic Baselines



Source: Francalanci, Romano, and Scovazzi, eds., *Atlas of the Straight Baselines* (1986) p. 115. Amended by the author.

A. TERRITORIAL SEA CLAIM

On 7 March 1955, the Philippines Permanent Mission to the UN sent a *note verbale* to the Secretary-General which set out the Philippine position with regard to the territorial sea and archipelagic theory. It reads as follows:[126]

> All waters around, between and connecting different islands belonging to the Philippine archipelago, irrespective of their width or dimension, are necessary appurtenances of the land territory forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas are embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930 and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of the Commonwealth Act.

Article 3 of the 1898 Treaty of Paris defined the area of the Philippine territorial sea or 'Treaty Limits' as follows:[127]

> Article III
> Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within the following lines:
> A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty-seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty-seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty-five minutes (4°45') north latitude, thence along the parallel of four degrees and forty-five minutes (4°45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty-five minutes (119°35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty-five minutes

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126 See the *note verbale* of 7 March 1955 from the Philippines government to the UN Secretary-General. In 2 *YILC* (1956) p. 69. Also Coquia and Defensor-Santiago, *Public International Law* (1984) p. 329.

127 Castro, ed., *The Philippines and the Law of the Sea* (1983) pp. 15-21.

(119°35') east of Greenwich to the parallel of latitude seven degrees and forty minutes (7°40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning.

The Philippine 'Treaty Limits', those lines of latitude and longitude mentioned in the 1898 Treaty of Paris, embraces vast areas of the western Pacific and of the South China Sea, such as the Sulu Sea. The width of the Philippine territorial sea boundary as established by these treaties varies from 270 miles offshore into the Pacific Ocean to 147 miles offshore on the South China Sea side and diminishes to less than two miles in width at its narrowest part in the southwest corner. By traditional practice, territorial sea is a *belt* of waters, while the Philippine 'Treaty Limits' is roughly rectangular in shape.[128] <See Map 8> A territorial sea claim of this nature is quite unique in international law and international practice. As Philippine Senator Tolentino stated,

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[128] Drigot, "Oil Interests and the Law of the Sea: The Case of the Philippines," 12 *ODIL* (1982) p. 32. In Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, Article 1(1) stipulates,

> The sovereignty of a state extends, beyond its land territory and its internal waters to a *belt* of sea adjacent to its coast, described as the territorial sea. [emphasis added]

In LOSC, Article 2(1), it also provides,

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent *belt* of sea, described as the territorial sea. [emphasis added]

"The Philippines is *sui generis*, and cannot be covered by any general rule that may now be formulated on the breadth of the territorial sea."[129]

B. ARCHIPELAGIC CLAIM

Several states had claimed a special regime for the waters of their archipelagos before the completion of UNCLOS III.[130] The Philippines and Indonesia are two of those claiming such a regime in Southeast Asia.[131] As early as 1955, the Philippine government had stated its position on the archipelagic doctrine. In a position paper dated March 1955, the Philippines stated that[132]

> All waters around, between and connecting different islands belonging to the Philippine archipelago, irrespective of their width or dimension, are necessary appurtenances of the land territory forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.

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[129] Tolentino, *Second United Nations Conference on the Law of the Sea, Verbatim Record of the Committee of the Whole*, p. 77.

[130] They include Antigua and Babuda, Maritime Areas Act, 1982; Cape Verde, Decree-Law No. 126/77 of 31 December 1977; Comoros, Law No. 82-005 Relating to the Delimitation of the Maritime Zones, 28 July 1982; Fiji, Marine Spaces Act, 1977 and Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order, 27 November 1981; Indonesia; Papua New Guinea, National Seas Act, 1977; The Philippines; Sao Tomé and Principe, Decree-Law No. 48/82, 14/78, 15/78; Solomon Islands, Declaration of Archipelagos of Solomon Islands, 1979 and Declaration of Archipelagic Baselines, 1979; Vanuatu, The Maritime Zones Act, 1981.

[131] For Indonesia's claim, see Announcement on the Territorial Waters of the Republic of Indonesia of 14 December 1957, in Whiteman, *Digest of International Law*, Vol. 4 (1965) p. 284.

[132] *Supra* note 126.

The Philippines advanced this position in UNCLOS I. During the preparatory work for UNCLOS I, the Philippines submitted proposals to treat mid-ocean archipelagos as one whole unit.[133] However, this concept was not adopted at the Conference and this was instrumental to the Philippines deciding to refuse to sign the four Geneva Conventions of 1958.[134]

On 14 March 1973, the Philippine delegation joined with the delegations of Fiji, Indonesia and Mauritius in proposing the Guidelines of the Archipelagic States:[135]

1. An archipelagic state, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically have or may have been regarded as such, may draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic state is or may be determined.
2. The waters within the baselines, regardless of their depth or distance from the coast, the seabed and the subsoil thereof, and the superjacent airspace, as well as all their resources, belong to and are subject to the sovereignty of the archipelagic state.
3. Innocent passage of foreign vessels through the waters of the archipelagic state shall be allowed in accordance with its national legislation, having regard to the existing rules of international law. Such passage shall be through sea lanes as may be designated for that purpose by the archipelagic state.

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133 UN Doc. A/CONF.13/18, 1958.

134 Tolentino, *supra* note 27, p. 19.

135 UN Doc. A/AC.138/SC.II/L.15. Also see UN, *Archipelagic States, Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (1990) p. 7.

In order to secure the concept of archipelagic states during the processing of UNCLOS III, the Philippine representative reiterated the importance of this idea to his country.[136]

In the domestic legislation setting, the Philippine Republic Act No. 5446 of 18 September 1968,[137] which amended Section 1 of the Republic Act No. 3046,[138] defined the eighty baselines of territorial sea by connecting with straight lines the outermost points of the outermost islands of the Philippine archipelago. It declared that

> [A]ll waters within the Treaty Limits have always been regarded as part of the territory of the Philippine Islands; all the waters around, between and connecting the various islands of the Philippine archipelago, irrespective of their width or dimension, have always been considered as necessary appurtenances of the land territory, forming part of the inland or internal waters of the Philippines; all the waters beyond the outermost islands of the archipelago but within the limits of the boundaries set forth in the aforementioned treaties comprise the territorial sea of the Philippines.[brackets added]

Under this Act, by drawing the eighty straight baselines joining the outermost points of the outermost islands and drying reefs, the total area of the Philippines, including the waters which are considered as being internal waters, is approximately

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136 UNCLOS III, *Official Records*, Vol. I (1975) Second Session, 31st Meeting, paras. 47-53; Vol. II (1975) Second Committee, 36th Meeting, paras. 57, 65, and 66; Vol. XIV (1982) 138th Meeting, paras. 112 and 116; Vol. XVI (1984) 162nd Meeting, paras. 101-103.

137 UN, *Baselines: National Legislations with Illustrative Maps*, *supra* note 104, p. 251.

138 *Ibid.*, p. 250.

212,745 m². The largest enclosed body of water which claimed as internal waters is the Sulu Sea with an area of 86,000 m².[139] <See Map 8>

C. EXCLUSIVE ECONOMIC ZONE CLAIM

An EEZ is established in consideration of the resources which it may offer the controlling state. To the Philippines, the main reason for the EEZ is the economic exploration and exploitation of the resources, namely oil and fisheries, within the zone. We shall have a look at these reasons.

About 95% of Philippine oil consumption is dependent on imported oil from the Middle East and Indonesia.[140] However, the hundreds of petroleum and gas seepages in several parts of the Philippines are generating hopes that eventually oil could be found and produced in commercial quantities. This possibility is further strengthened by the geologic structure of the Philippines, which is similar to that of its neighbouring states in this region. According to geologists, one similarity is that the thick marine sediments found in several areas in the Philippines correlate with similar deposits in Borneo, Sumatra, and Java. Another positive geological factor is that most of the petroleum found in the ASEAN region comes from long and narrow

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[139] Coquia, "Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea," 8 *Philippine Yearbook of International Law* (1982) pp. 28-29; *Idem.*, "The Territorial Waters of Archipelagos," *Philippine International Law Journal* (1962) p. 148. Cf. Dubner, *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States* (1976) pp. 61-62.

[140] Chanda, "South China Sea: Treacherous Shoals," *FEER* (13 August 1992) p. 16.

geosynclinal basins similar to those found in the Philippines.[141] The new discoveries of crude oil, such as the wells off Palawan, are estimated to bring the Philippines' dependence on import oil down to about 85%.[142]

In terms of the fishing resources, tuna resources, particularly yellowfin and skipjack, should be a major objective and remain one of the resources with a promising potential for increased exploitation for the Philippines.[143] With a good management system in the EEZ, the Philippines could benefit from the following aspects:[144]

A. Certain characteristics of the tuna fisheries and the industry make tuna an ideal object for a variety of business arrangement with foreign investors, especially those who can provide additional capital and improved fishing and processing technology. Through a properly designed joint venture system, the Philippines could obtain capital and technology. This would be a good source of foreign currency helping Philippine national development.[145]

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[141] Rajaretnam, *Oil Discovery and Technical Change in Southeast Asia,* Field Report Series No. 6 (1973) p. 21; Tangsubkul, *supra* note 118, p. 86.

[142] Chanda, *supra* note 140.

[143] See *supra* Sub-Section 2.3.

[144] Cited from Aprieto, *Fishery Management & Extended Maritime Jurisdiction* (1981) pp. 44-49. Cf. Ronquillo, "The Allocation of Tuna Fisheries," in Christy, ed., *Law of the Sea: Problems of Conflict and Management of Fisheries in Southeast Asia,* Proceedings of the ICLARM/ISEAS Workshop on the Law of the Sea (1978) p. 10; Ferndandez, *supra* note 27, p. 61.

[145] See Saisunthorn, *Fisheries of the ASEAN States: Transition in the 200-Mile EEZ Regime* (1988) p. 38; *SEAFDEC Fishery Statistical Bulletin for South China Sea Area,* Bangkok, Thailand (1985).

B. The distant water fishing nations, such as Japan, South Korea, and Taiwan have been harvesting annually a catch estimated to be from 50,000 mt to 100,000 mt a year within the Philippine territorial waters and its EEZ. The determination of the total allowable catch and the maximum sustainable yield has to be undertaken in collaboration with all nations fishing and undertaking stock assessment studies in the region. Therefore, the relevant data could be obtained from foreign vessels.

Consequently, following the consolidation of the concept of the EEZ in UNCLOS III, the Philippine government considered establishing its EEZ to ensure its economic survival and development. Under such circumstances, the Philippines declared a 200-mile EEZ on 11 June 1979.[146]

3.4. VIETNAMESE MARITIME CLAIMS

On 12 May 1977, Vietnam proclaimed its maritime zones: a 12 nm territorial sea, a 12 nm contiguous zone, and a 200 nm EEZ. Within this, its territorial sea has "a breadth of 12 nautical miles measures from a baseline which links the furthest seaward points of the coast and the outermost points of Vietnamese offshore islands, and which is the low-water line along the coast."[147] On 12 November 1982, a much more radical

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[146] The Philippine Presidential Decree No. 1599, *Establishing An Exclusive Economic Zone and for Other Purposes*. Text reproduced in UN, *National Legislation on the Exclusive Economic Zone* (1993) pp. 268-269.

[147] Vietnamese Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf of 12 May 1977. For the Statement, see UN, *National Claims to Maritime Jurisdiction*, *supra* note 104, pp. 141-142.

baseline system was announced.[148] The baseline extends from the Gulf of Thailand, southeast of Ko Way, to the coast of Vietnam at the entrance of the Gulf of Tonkin, at 17° 10' north latitude.<See Map 9>

The Vietnamese baseline system uses nine turning points, two of which are more than 80 nm offshore, while three others are more than 50 nm offshore. The four longest of the ten baselines are 162, 161, 149, and 105 nm long, enclosing a water area of 27,000 nm² in all. Sections of this baseline are plainly in breach of existing rules for drawing straight baselines. Since the sections concerned are not deeply indented the lines must be based on the concept of fringing islands.[149] Vietnam's claims were protested by Thailand in 1985 and by Singapore in 1986 as contrary to the established rules of international law of the sea.[150]

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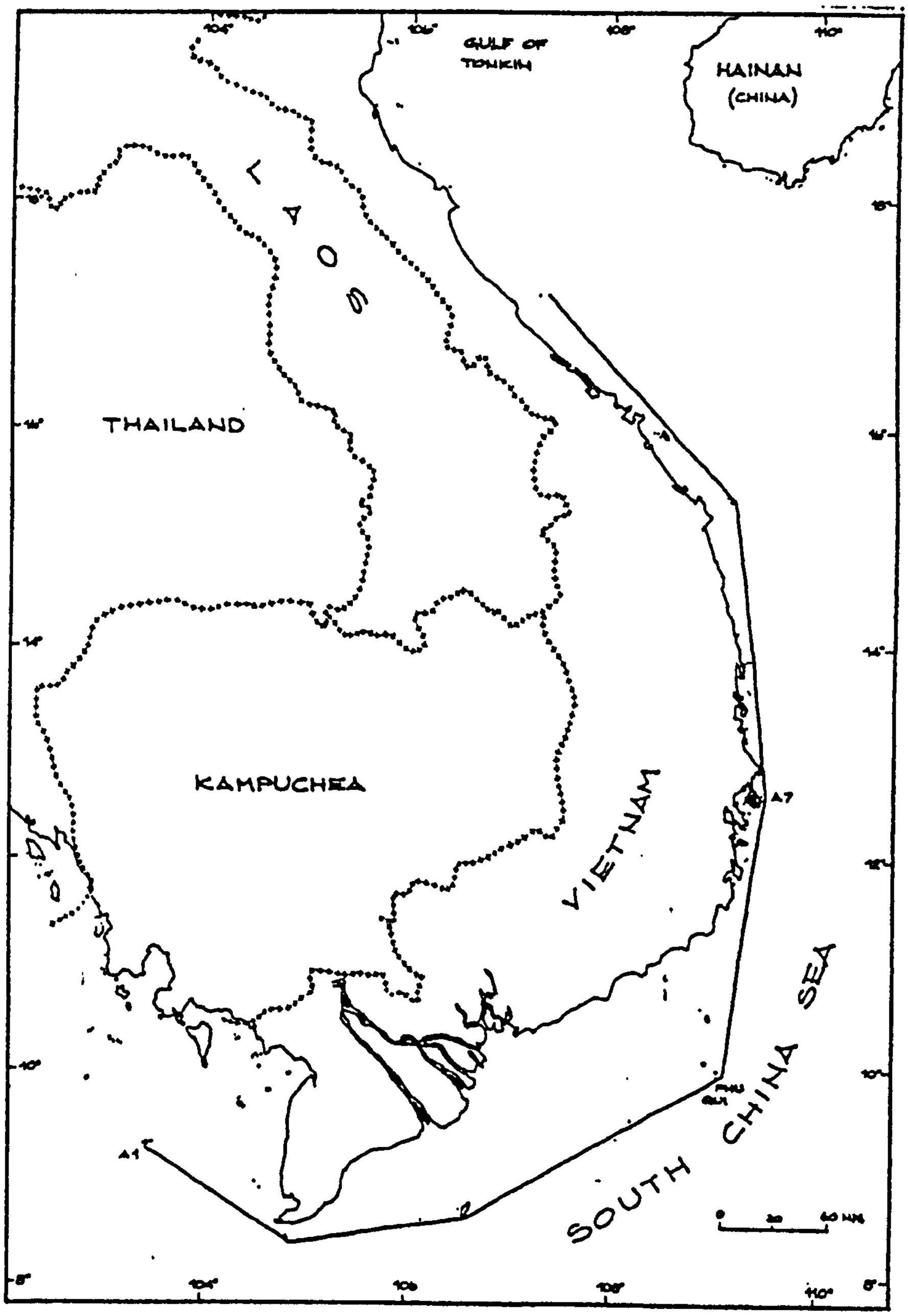
[148] Statement of 12 November 1982 by the Government of the Socialist Republic of Vietnam on the Territorial Sea Baseline of Vietnam, in UN, *Baselines: National Legislation with Illustrative Maps*, *supra* note 104, pp. 384-387.

[149] Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (1987) pp. 16-17; Prescott, *supra* note 7, p. 212; Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) pp. 106-107, 133-136; Valencia and Van Dyke, "Vietnam's National Interests and the Law of the Sea," 25 *ODIL* (1994) pp. 221-223.

[150] For Thailand's protest, see Statement by Thai Ministry of Foreign Affairs dated 9 December 1985, 7 *LOS Bulletin* (April 1986) p. 111; For Singapore's protest, see Singapore Note dated 5 December 1986, 9 *LOS Bulletin* (April 1987) p. 53.

Map 9 Vietnam's Straight Baselines Claim



Source: Francalanci, Romano, and Scovazzi, eds., *Atlas of the Straight Baselines* (1986) p. 135.

Vietnam's claims overlap the PRC's claim in the Gulf of Tonkin, Indonesia's north of the Natuna Islands, Malaysia's in the Southern Gulf of Thailand, and Thailand's and Cambodia's in the eastern Gulf of Thailand.[151] Besides, Vietnam has maritime overlapping problems with the PRC and Taiwan concerning the Paracel Islands, and with Malaysia, the PRC, the Philippines, and Taiwan on the Spratly Islands.[152]

4. LITTORAL STATES' CLAIMS TO THE SOUTH CHINA SEA

The current political situation of the islands in the South China Sea is as follows:

A. The Pratas Islands (Dong-sha-chun-dao in Chinese), 240 nm southwest of Taiwan at 20°30' to 21°31' north latitude and 116° to 117° east longitude, consists of two banks and an island.[153] This group of islands are under the administration of the ROC government. A Taiwanese garrison is located on the biggest island, Pratas Island (Dong-sha-dao). Pratas has had a concrete runway, 4,500 meters in length, since July 1987, which is capable of accommodating C-130H cargo planes.[154] The sovereignty of these islands is not contested.

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[151] Valencia, "Vietnam's Maritime Disputes: Hydrocarbon Resource Potential and Possible Solutions," 16 *Energy* (1991) p. 1158.

[152] Cf. *infra* Sub-Section 4.4.

[153] Lo, *China's Policy Towards Territorial Disputes: The Case of South China Sea Islands* (1989) pp. 5-6; Buchholz, *Law of the Sea Zones in the Pacific Ocean* (1987) p. 49; Valero, *supra* note 27, p. 315.

[154] Yu, "Issues on the South China Sea: A Case Study," 11 *CYILA* (1991-92) pp. 170-171.

B. Macclesfield Bank is a wholly and permanently submerged atoll which situated at 15°20' to 16°20' north latitude and 113°40' to 115° east longitude.[155] The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and the 1982 LOSC have some provisions concerning such a situation.[156] In the 1958 Geneva Convention, Articles 10 and 11 read:

> Article 10(1)
> An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.
> Article 11(1)
> A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide ...

Article 6 of LOSC reads

> In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef ...

Article 13(1) of LOSC is verbatim from Article 11(1) of the 1958 Geneva Convention mentioned above,

> A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.

Obviously, Macclesfield Bank does not fall properly into any of the above articles. Thus its limited value makes the question of who exercises control over it comparatively unimportant.[157]

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155 Valero, *supra* note 27, p. 315.

156 Also see O'Connell, *supra* note 66, pp. 195-196; Nordquist, et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol. 2 (1993) pp. 91-94.

157 Lo, *supra* note 153, p. 26.

C. The Paracel Islands (Hsi-sha-chun-dao) is an archipelago lying approximately 150-200 nm from both Hainan Island and Vietnam. It consists of about 130 barren uninhabited islands, all clustered in two groups, the Crescent group to the west and the Amphritite group to the east.[158] The largest island, Woody Island (Yung-hsin-dao), situated on the northeast, is about 1,950 metres long and 1,350 metres wide.[159] The PRC has been in possession of the entire Paracel archipelago following a battle between the PRC and the former South Vietnam in January 1974.[160]

D. The Spratly Islands (Nan-sha-chun-dao) are located approximately 300 nm west of the Philippine island of Palawan, 300 nm east of Vietnam and 650 nm south of Hainan. The Spratlys consist of twenty-six reefs, twenty-one shoals, ten banks, five islands, and three cays.[161] These islands and islets are in the middle of a much more complicated dispute than the aforementioned island groups. The ROC, the PRC, Vietnam, Malaysia, Brunei, and the Philippines all lay claim to one or more parts of this disputed area. <See Map 10>

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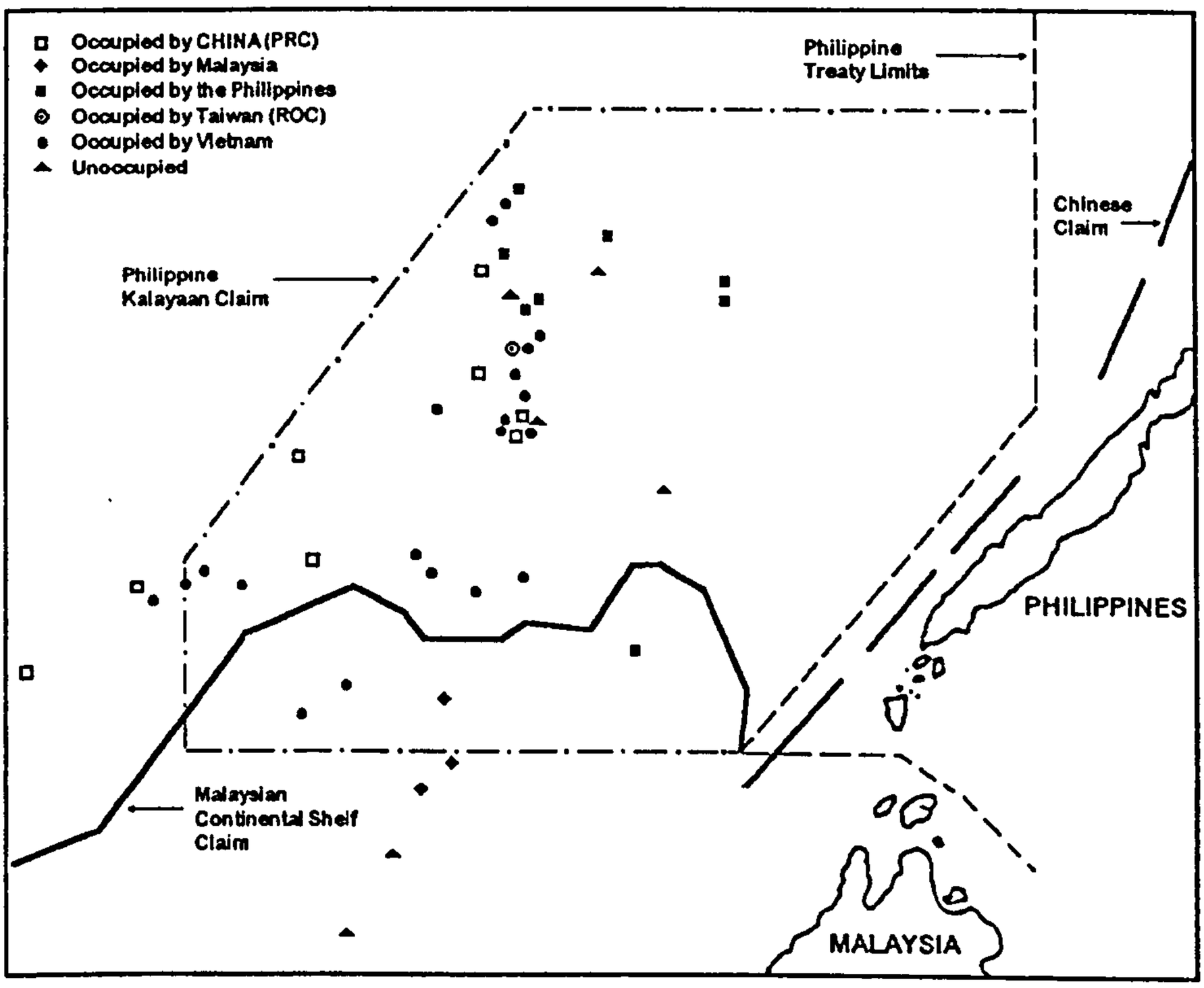
158 *Keesing's* (1974) p. 26388; Chao, "South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands." 9 *CYILA* (1989) pp. 68-69; Greenfield, *supra* note 64, p. 151.

159 Anderson, *An Atlas of World Political Flashpoints: A Sourcebook of Geopolitical Crisis* (1993) pp. 160-161; Park, *supra* note 18, p. 203.

160 For information on the battle, see Lo, *supra* note 153, pp. 53-63.

161 Anderson, *supra* note 159, pp. 193-195; Park, *supra* note 18, p. 203.

Map 10 The Spratly Islands



Source: Valencia, "Spratly Solution Still at Sea," 6 *P. Rev.* (1993) p. 156.
Amended by the author.

Owing to the delicate political situation and abundant natural resources, almost all littoral states claim sovereignty over the whole or part of the island group. The basis of the claims are as follows:

4.1. CHINA

Basically, the two Chinese governments have similar attitudes towards the islands in South China Sea, because they draw on the same historic evidence:[162]

1. More than 2,000 years ago, Chinese people were already sailing on the South China Sea, as recorded in ancient Chinese literature. By the time of the Western and Eastern Han dynasties (206 B.C.-220 A.D.), the South China Sea had become an important navigation route for the Chinese people.[163]

2. In order to commemorate the reigns of the two Ming Emperors, Cheng-tsu (1403-1424 A.D.) and Hsuan-tsung (1426-1435 A.D.), Yung-lo and Hsuan-teh were attached to the Paracels' two sub-groups of islands, Amphitrite and Crescent.[164]

3. An official statement was made in 1877 by China's first ambassador to Britain, Kuo Sung-tao, to the effect that the Paracel Islands 'belong to China'.[165]

4. In 1883, Germany carried out surveys on the Paracel and Spratly Islands, but ceased these operations after the Ching government protested.[166]

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[162] Yu, *supra* note 12, pp. 5-6; *Beijing Review* (12 December 1975), quoted from Park, *supra* note 18, p. 212. For the history of Chinese people in the South China Sea, see Chao, *supra* note 158, pp. 73-77; Samuels, *supra* note 15, pp. 9-50.

[163] *Beijing Review* (12 December 1975). See Park, *ibid.*

[164] Heinzig, *supra* note *20*, p. 23.

[165] Samuels, *supra* note 15, p. 52.

[166] *Ibid.;* Chao, *supra* note 158, pp. 76-77; Heinzig, *supra* note *20*, pp. 25-26.

5. According to the 1887 Sino-French 'Convention Respecting the Delimitation of the Frontier Between China and Tonkin', France recognised that the Paracel (and Spratly) Islands were part of China.[167]

6. The Ching Dynasty's first official patrol of the Paracels was launched in 1902 by three warships from its Canton fleet, which was led by Admiral Li Chun and Vice-Admiral Wu Ching-yung. During their stay on the Paracel Islands, they planted imperial flags and a stone tablet commemorating the arrival of formal Chinese authority. This tablet was discovered in 1979 by the PRC's People Liberation Army stationed on the North Island.[168]

7. After the Pratas incident of 1907,[169] the second official patrol was launched in 1908 by a 'Special Provincial Commission for the Management of the Area'. The Commission was instructed to perform a formal reconnaissance of the islands and to establish sites for the construction of houses, roads, a radio station, and phosphate processing plants. Upon their return after a one-month stay on the Paracels, the Commission submitted an Eight-Point-Program Report recommending, *inter alia*, the administrative absorption and economic development of the Paracel Islands. This

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[167] Chiu and Park, "Legal Status of the Paracel and Spratly Islands," 3 *ODIL* (1975) pp. 11-13; Samuels, *supra* note 15, p. 71.

[168] Samuels, *ibid.*, p. 53; *Hongkong Standard* (6 March 1979) p. 5.

[169] In 1907, a Japanese entrepreneur-adventurer named Nishizawa Yoshiji, together with one hundred followers, occupied Pratas Island and renamed it for himself. The occupation ended in 1908 when China paid Nishizawa an indemnity of 130,000 silver dollars and Japan formally recognised Chinese sovereignty over the Pratas group. See Samuels, *ibid.*, p. 53.

Report was later approved first by Governor-General Chang of Kwangtung, then by Kwan-Hsu Emperor, and finally, carried out by the Chinese government in 1911 by incorporating the Paracels into Kwangtung Province, to be administered by the Prefectural Authority of Hainan Island.[170]

8. The issuance and withdrawal of licenses for exploitation of the Paracel Archipelago: From 1921-1932, five such licenses were issued by the ROC Provincial government of Kwangtung.[171]

9. Early in 1928, the ROC government appointed a commission to investigate the Paracel Islands. On 22 May 1928, members of the commission boarded a navy battleship and sailed to the Paracels. Upon their return, they published a final report titled 'Text of the Report on the Investigation of the Paracel Archipelago (Tiao-Cha Hsi-sha Chun-tao pao-kao shu)'. According to this Report, the whole area around the Paracles, especially Woody Island, had been investigated thoroughly.[172]

Therefore, both Chinese governments claim that the Paracel and Spratly Islands has always belonged to China in their entirety. This attitude has been shown on several occasions, although never jointly. Thus, protecting and defending Chinese territory had been the common argument of both Chinese governments. The

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170 Samuels, *ibid.*, pp. 53-54; Yu, *supra* note 12, pp. 5-6.

171 Yu, *ibid.*, p. 6.

172 Samuels, *supra* note 15, pp. 57-60.

following two sub-sections will discuss the two Chinese governments' separate actions concerning the South China Sea after 1949.

A. THE REPUBLIC OF CHINA (TAIWAN)

The ROC government was the first in the twentieth century to claim complete sovereignty over the Pratas Islands, Macclesfield Bank, the Paracel Islands, and the Spratly Islands, basing its claim on first discovery and continuous patronage of these islands dating back to the first century.[173] When the Spratly Islands were retroceded to the ROC in 1946, the Kwangtung Provincial government was given jurisdiction over them.[174] In 1947, the ROC Ministry of Interior's subsequent proposal to the central government to "temporarily transfer jurisdiction of the islands to the ROC Navy" was approved.[175] In addition, an official map was released, which showed the Pratas Islands, Macclesfield Bank, Paracel Islands, and Spratly Islands within its boundaries.<See Map 11>

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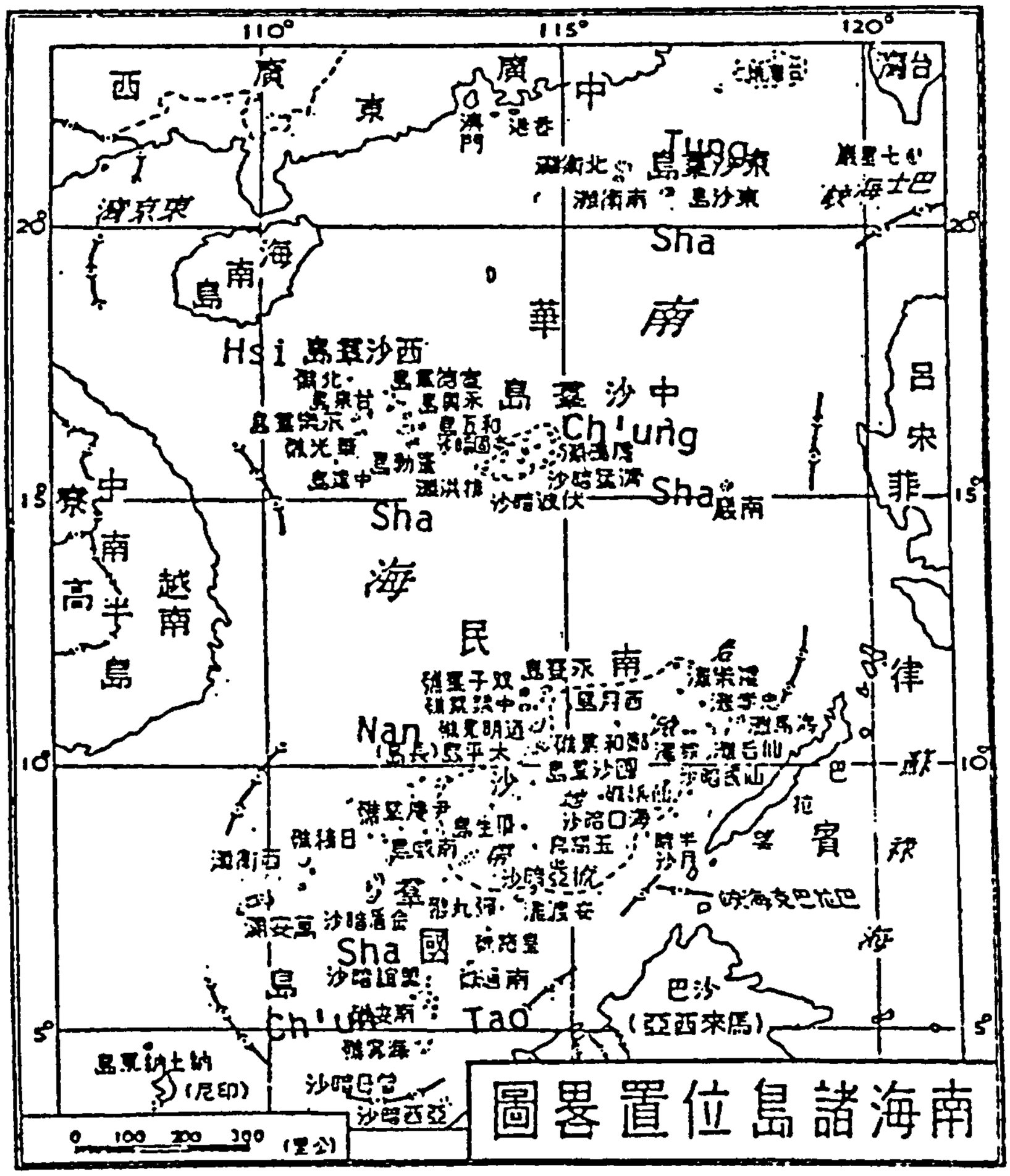
[173] Chang, "A New Scramble for the South China Sea Islands," 12(4) *Contemporary Southeast Asia* (1990) p. 22.

[174] Government Information Office, ROC, "The Republic of China's Sovereignty over the Spratly Islands," *Reference: ROC on Taiwan*, No. RR-93-02, 30 April 1993, p. 2.

[175] *Ibid.*

Map 11 The ROC's Claim on the South China Sea



Source: KMT Central Committee, Problems concerning the Various Islands in the South China Sea (1974).

In 1948, the ROC dispatched warships to the archipelago to conduct surveys and erect landmarks.[176] In 1949, the ROC President promulgated the 'Organisational

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[176] Chang, *supra* note 173, p. 22.

Statutes Governing the Office of the Special Administrator of Hainan' and transferred the jurisdiction of the Spratly Islands from the Kwangtung Provincial government to the Hainan Special Administrative District.[177] Owing to its defeat in the civil war in May 1950, the ROC government withdrew its forces on Hainan Island and the Paracel and the Spratly Islands to Taiwan. In the 1952 Treaty of Peace between the ROC and Japan,[178] Japan "renounces all right, title, and claim to the Spratly Islands, Paracel Islands, Pratas Islands, and Macclesfield Bank."[179] Although no sovereign successor was named in the Peace Treaty, the ROC claims that this Treaty is substantive proof that the ROC henceforth exercised complete sovereignty over these island groups.[180]

When, on 15 May 1956, a Philippine named Tomas Cloma claimed ownership, by discovery and occupation, of 'Freedomland',[181] the ROC government immediately protested to the Philippine government. A naval contingent was sent to patrol the Spratly Islands but found the Philippine had already left. Later a Taiwanese garrison force of about 600 troops was sent to Itu Aba Island (Tai-pin-dao in Chinese), the

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177 *Supra* note 174.

178 138 *UNTS* 38.

179 See discussion in Valero, *supra* note 27, p. 319; also compare the discussion in Chapter 3, Sub-Section 3.1.

180 Chiu and Park, *supra* note 167, p. 14.

181 See *infra* Sub-Section 4.3.

biggest island in the Spratly Islands,[182] and has remained there since then.[183] The Taiwanese Navy patrol Itu Aba Island and supply the garrison there every three or four months ever since.[184] In 1990, the Executive Yuan placed Tung-sha-dao (Pratas Island) and Tai-ping-dao (Itu Aba Island) under the temporary jurisdiction of the Kaohsiung City government, set up a postal system on the islands, and brought them under a unified administrative system.[185]

Itu Aba island is the only one of the Spratly Islands which is under Taiwanese control.<See Map 10>

B. THE PEOPLE'S REPUBLIC OF CHINA

Chinese leaders of the PRC maintain that China has 'undisputable sovereignty' over all the islands in the South China Sea. Although the PRC was not invited to attend the San Francisco Peace Conference in 1951 and did not sign the Treaty of Peace with Japan, its Foreign Minister, Zhou En-Lai, emphasised that[186]

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[182] Itu Aba Island is 1,358 meters long and 350 meters wide, the total area is about 0.5 sq. km. See Shen, *The Strategic Status of the South China Sea* (1983) p. 6. However, according to other scholars, the biggest island is Thi Tu Island. See Samuels, *supra* note 15, p. 189; Jenkins, "The Spratlys: A 2000-year-old Claim," *FEER* (7 August 1981) pp. 30-33.

[183] *Central Daily News* (2 December 1992) p. 4.

[184] Shen, *supra* note 182, p. 6.

[185] *Supra* note 174.

[186] *Collected Documents on the Foreign Relations of the People's Republic of China,* Vol. 2 (Peking, 1961) p. 32. For discussion, see Valero, *supra* note 27, p. 319 *et seq.*

[T]he Paracel Archipelago and Spratly Island, as well as the whole Spratly Archipelago, and the Chung-sha (Macclesfield Bank), and Tung-sha (Pratas) archipelagos have always been Chinese territory ... The Central People's Government of the People's Republic of China declares herewith: The inviolable sovereignty of the People's Republic of China over Spratly Island and the Paracel archipelago will by no means be impaired, irrespective of whether the American-British draft for a peace treaty with Japan should make any stipulations and of the nature of any such stipulations.

On 4 September 1958, in its Declaration on Territorial Sea,[187] the PRC proclaimed that the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands belonged to it.[188]

On 30 January 1980, the PRC Ministry of Foreign Affairs issued a document entitled 'China's Indisputable Sovereignty over Xisha and Nansha Islands',[189] which argued that the Chinese were the first to discover, develop, and administer the Paracel and Spratly Islands. Hence, China has historical rights to those islands.

The latest action taken by the PRC was on 25 February 1992, when it adopted the 'Law on the Territorial Sea and the Contiguous Zone' to legalise its claim. In this Law, it provides that the Dongsha Islands (the Pratas Islands), the Xisha Islands (the

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187 See this Chapter, Sub-Section 3.1.B.

188 Declaration on China's Territorial Sea, Article 4.

189 *Beijing Review* (4 February 1980) pp. 15-24.

Paracel Islands), the Zhongsha Islands (Macclesfield Bank), and the Nansha Islands (the Spratly Islands) are a part of its land territory.[190]

The PRC declared that it would resort to any measure to solve the territorial issues with other littoral states in the South China Sea region. The PRC Premier, Li Peng, made it known in Singapore in 1990 that China was willing to shelve the sovereignty issue and co-operate with the concerned countries in Southeast Asia to develop the resources around the Spratly Islands.[191] Likewise, the PRC President Yang Shangkun proposed in his ASEAN trip in June 1991 that there should be consultations among the rival countries for joint economic exploitation of the South China Sea. According to Yang, China 'in due time', would be prepared to solve the dispute over the islands 'through friendly consultations with the other countries.'[192]

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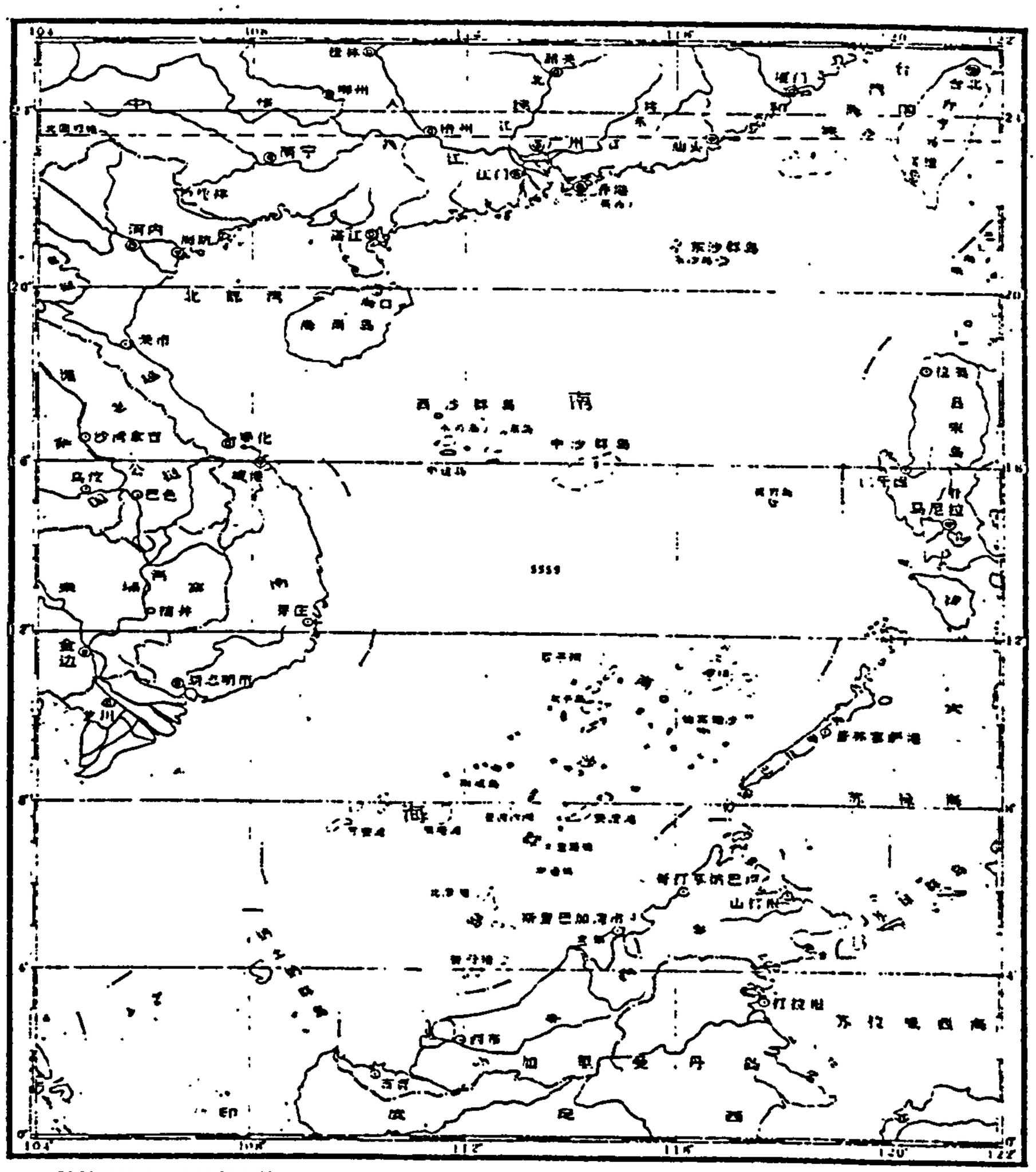
[190] *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (1992), Article 2. Text reproduced in 21 *LOS Bulletin* (August 1992) p. 24. For the analysis of the Chinese territorial sea law, see Kim, *supra* note 112, p. 894; Wang and Pearse, "The New Legal Regime for China's Territorial Sea," 25 *ODIL* (1994) pp. 431-442.

[191] Lee, "Domestic Changes in China since the 4 June Incident and their Implications for Southeast Asia," *Contemporary Southeast Asia* (June 1991) p. 39.

[192] *Straits Times* (9 June 1991) p. 6.

Map 12 The PRC's Claim on the South China Sea



Source: Institute of South China Sea Oceanography, PRC, *Basic Atlas* (1981).

Basically, the PRC claims the same area as the ROC does.<See Map 12> The PRC currently occupies the whole Paracel Islands and the following seven islands in the Spratlys: Crarteron Reef, Fiery Cross, Gaven Reefs, Kennan Island, Landsdowne

Reef, Mischief Reef, Prince of Wales Bank, and Subi Reef.[193] The PRC has a total of about 260 troops stationed on these islets.[194]<See Map 10>

4.2. MALAYSIA

Malaysia did not claim any section of the Spratly Islands until 1978, when a senior Malaysian official visited and claimed a number of islands in the southern region of the Spratlys, including Amboyna Cay, Commodore Reef, and Swallow Reef.[195] The next year, maps published by Kuala Lumpur showed the continental shelves off the east coast of the Malaysian peninsula, Sarawak, and Sabah as well as the boundary enclosing the Amboyna Cay, Commodore Reef, and Swallow Reef.[196] In May 1983, Kuala Lumpur, for the first time, landed troops on the Swallow Reef and has since maintained a platoon of soldiers there.[197] Since November 1986, two more platoons

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[193] Ji, *The Spratlys Disputes and Prospects for Settlement* (1992) p. 2; Valencia, "All-for-Everyone Solution," *FEER* (30 March 1989) pp. 20-21. For the recent development about Mischief Reef, see Chapter 5, notes 75-76 and the accompanying text.

[194] *Central Daily News* (2 December 1992) p. 4.

[195] Dzurek, "Boundary and Resource Disputes in the South China Sea," 5 *OY* (1985) p. 260.

[196] Day, ed., *Border and Territorial Disputes* (1982) p. 126; Jenkins, *supra* note 182, p. 30.

[197] *FEER* (28 September 1983) pp. 40-41.

have been dispatched, one to Mariveles Reef and another to Dallas Reef.[198] At present, a total force of 70 troops are garrisoned on those three reefs.[199]

The legal grounds for the Malaysian claim to these islands are not very clear. Nonetheless, two assumptions could be justified. First, that Malaysia considers those islands as a part of its territory. This attitude can be seen in its document defending its action in garrisoning Swallow Reef. The Malaysian Foreign Ministry issued a statement on 9 September 1983 claiming that whilst "the Malaysian Government has no claim whatsoever over the 'Spratly Islands'," the Swallow Reef "has always been and is part of the territory of Malaysia."[200] Secondly, according to the Malaysian Continental Shelf Act of 1966,[201] those islands and reefs are located within the continental shelf of Sabah, thus, Malaysia's rights to them are a simple matter of geography. To reinforce such claims, Malaysia erected obelisks on the Louisa and Commodore reefs.[202]

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198 *Straits Times* (29 June 1988) p. 11.

199 *Central Daily News* (2 December 1992) p. 4.

200 Statement of the Malaysian Foreign Ministry, 9 September 1983; Hamzah, *The Spratlies: What Can Be Done to Enhance Confidence* (1990) p. 7. Similar attitude can be seen from Malaysian Foreign Ministry's statement in 1988 after the armed conflict between the PRC and Vietnam. *New Straits Times* (25 February 1988), cited from Haller-Trost, *The Spratly Islands: A Study on the Limitations of International Law* (1990) p. 65.

201 See this Chapter, Sub-Section 3.2.

202 Although it is believed that these monuments on Commodore Reef were destroyed by the Philippines authorities. See Prescott, *supra* note 7, p. 222.

Malaysia occupies Amboyna Cay, Commodore Reef, and Swallow Reef.[203]<See Map 10>

4.3. THE PHILIPPINES

The Philippine government claim to sovereignty over the Spratly Islands is based on occupation, which has been one of the important methods to seize sovereignty on a particular piece of *terra nullius* land since the nineteenth century. The Philippines considered the archipelago as a *terra nullius* till 1956 when a Philippine fisherman and navigator, Tomas Cloma, claimed discovery of the archipelago.[204] Tomas Cloma, the owner of a fishing fleet and the Philippine Maritime Institute, set out with his brother and a crew of forty men to take formal possession of some of the Spratly Islands on 11 May 1956. They raised the Philippine flag on various islands, most of them being the major islands of the Spratlys, including Spratly Island, Itu Aba Island, Nam Yit Island, and Thi Tu Island. A few days later he proclaimed their new possession as the 'Archipelago of Freedomland (Kalayaan).'[205] He emphasised that the claim was based on 'rights of discovery and/or occupation', because those islands are outside Philippine

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203 Cf. Haller-Trost, *supra* note 200, pp. 67-70.

204 From the Philippine point of view, the Spratly Islands were *terra nullius* because, in the 1951 Peace Treaty, Japan only renounced its rights to the islands, but did not specify recipients of the abandoned title. Cf. *supra* note 179-180 and the accompanying text.

205 "Freedomland: Government States Position on Imbroglio over Isles," *New Philippines* (6 February 1974) p. 7; *Results of Naval Patrols in the Spratly Island Frontier* (1975) p. 89. Also, Samuels, *supra* note 15, pp. 81-82.

waters and not within the jurisdiction of any country.[206] In other words, *res nullius naturaliter fit primi occupantis* is Cloma's view on the occupation of those islands. On 6 July 1956, Cloma declared the establishment of a separate government for the 'Free Territory of Freedomland', with a capital at Pag-asa Island (Flat Island), and with himself as 'Chairman, Supreme Council of State'.[207]

In response to Cloma's proclamation, in December 1956, Filipino Vice-President Garcia announced the Philippine government's position:[208]

> Insofar as the Department of Foreign Affairs is concerned, it regards the islands, islets, coral reefs, shoals, and sand cays comprised within what you call 'Freedomland', with the exclusion of those belonging to the seven-island group known internationally as the Spratlys, as *res nullius*, some of them being newly-risen, others marked on international maps as uncharted and their existence doubtful, and all of them being unoccupied and uninhabited; which means, in other words, that they are open to economic exploitation and settlement by Filipino nationals, who have as much right under international law as nationals of any other country to carry on such activities, so long as the exclusive sovereignty of any country over them has not been established in accordance with the generally accepted principles of international law, or recognised by the international community of nations.
>
> As regards the seven-island group known internationally as the Spratlys, the Philippine government considers these islands under the *de facto* trusteeship of the victorious Allied Powers of the Second World War, as a result of the Japanese Peace Treaty, signed and concluded in San Francisco on September 8, 1951, whereby Japan renounced all its rights, title and claim to the Spratly Islands and to the Paracel Islands, and there being no territorial settlement made by the Allied Powers, up to the present with respect to their disposition. It follows, therefore, that as long as this group of islands remain in that status, it is equally open to economic exploitation and settlement by nationals or any members of the Allied Powers on the basis of equality thereto.

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206 Cited from Samuels, *ibid.*, p. 82.

207 *Ibid.*

208 *Ibid.*, pp. 82-83.

In view of the *geographical location* of these groups of islands and islets embraced within 'Freedomland', their *proximity* to the western territorial boundaries of the Philippines, their historical and geological relations to the Philippine archipelago, their immense strategic value to our national defence and security, aside from their economic potential which is admittedly considerable in fishing, coral and sea products, and in rock phosphate, assuredly the Philippine government does not regard with indifference the economic exploitation and settlement of these uninhabited and unoccupied groups of islands and islets by Philippine nationals so long as they are engaged in furtherance of their legitimate pursuits. [emphasis added]

The Philippines took an equivocal position in dealing with Cloma's proclamation. In order to avoid any possible confrontation with other concerned states, Garcia combined 'the seven-island group known internationally as the Spratlys' with 'Freedomland' in order to imply that they were *res nullius* on the assumption that the status of the Spratly Islands was still undetermined. The Philippine attempt is understandable if we examine its geographical situation. The Philippines has virtually no physical continental shelf along its western coast. The 200-meter isobath line on the southeast running very close along Palawan and Luzon islands,[209] which made the 'natural prolongation' principle is simply unhelpful to the Philippines if it wants to claim its jurisdiction over the Spratly Islands. Thus, based on the theories of 'occupation' and 'proximity', the Philippine government could be better placed to claim control over those islands.[210] Obviously, Garcia's announcement is a tactful arrangement for any further claim in the future.

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209 Park, *supra* note 18, p. 179.

210 Meyer, *A Diplomatic History of the Philippine Republic* (1965) p. 198; also, Drigot, *supra* note 128, pp. 41, 44.

On 10 July 1971, the Philippine government, claiming that an unarmed Philippine vessel operating in the Spratly Islands had been fired upon by an ROC naval patrol unit,[211] sent a diplomatic note to Taipei demanding the withdrawal of a Chinese garrison from Itu Aba on the grounds that:[212]

1. The Philippines has a legal title to the island group as a consequence of the occupation by Tomas Cloma;
2. The presence of the Chinese forces in Itu Aba constituted a serious threat to the security of the Philippines;
3. The Chinese occupation of some islands in the Spratly group constituted *de facto* trusteeship on behalf of the World War II allies which precluded the garrisoning of the islands without the allies' consent;
4. The Spratly group is within the archipelagic territory claimed by the Philippines.

This was the first time that the Philippines articulated an official claim to part of the Spratly Islands.

On 11 June 1978, President Ferdinand E. Marcos declared Presidential Decree No. 1596, which enclosed an area constituting a distinct and separate municipality of the Province of Palawan and which was to be known as Kalayaan.[213]<See Map 8>

Up to the present, Manila has seven Spratly islands under its control. They are Flat Island, Lankiam Cay, Loaita Island, Nanshan Island, Northeast Cay, Thi Tu Island,

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211 Samuels, *supra* note 15, p. 89.

212 "Government States Position," *New Philippines* (10 July 1971) p. 10; Coquia, "Philippine Position on the South China Sea Issues," in Cariño, ed., *The South China Sea Disputes: Philippine Perspections* (1992) p. 53.

213 Castro, ed., *supra* note 127, pp. 38-39.

and West York Island.[214] The Philippines has stationed over 480 marines on these islands.[215] On the Thi Tu Island, Manila maintains a runway which is capable of landing C-130H Hercules plane.[216]<See Map 10>

4.4. VIETNAM

Vietnam is situated on the eastern coast of the Indochina Peninsula, and has a 2,828 nm of coastline.[217] Given this geographical location, it is easy to understand that Vietnam is eager to extend its claim on the vast maritime waters in the South China Sea. On 21 October 1956, the Republic of Vietnam (South Vietnam) assigned the Spratlys to Phuoc Tuy Province by Decree No. 143/NV.[218] This was followed by two more decrees, No. 76/BNV/HC 9 ND of 21 March 1958 and No. 34/NV of 27 January 1959, whereby the 1956 decree was either reconfirmed or adjusted.[219] In order to counter South Vietnam's claim, the government of the Democratic Republic of Vietnam (North Vietnam) supported the PRC's claim to the Spratly Islands. Also on the occasion of the PRC's declaration on territorial sea in 1958, the then Prime Minister Pham Van Dong

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214 Prescott, *supra* note 7, p. 218.

215 *Central Daily News* (2 December 1992) p. 4.

216 *South China Morning Post* (18 March 1987) p. 21.

217 Valencia and Van Dyke, *supra* note 149, p. 217.

218 Chiu and Park, *supra* note 167, p. 9.

219 *Ibid.*

again repeated this attitude.[220] This statement by the North Vietnamese government seriously weakened its position on its claim of sovereignty over the Spratly Islands.

The Vietnamese attitude to the Paracel and the Spratly island groups is that they have 'from time immemorial' been part of their territory. They argue that:[221]

> From time immemorial, these islands have been frequented by Vietnamese fisherman who went there for tortoises, sea slugs, and other marine creatures ... the Spratlys are closest to Vietnam geographically and have been part of her territory early in history. In 1834, under the reign of Emperor Minh Mang, the Spratlys appeared in the first Vietnamese map as an integral part of the national territory.

In order to strengthen its position, on 28 September 1979, the Vietnamese government released a White Book, 'Vietnam's Sovereignty Over Hoang Sa and Truong Sa Archipelagos', which listed nineteen items of evidence, including official records, maps, decrees, administrative decisions, and statements made by the former French colonial government and the South Vietnamese government. Furthermore, it stated that Vietnam was the first country to survey, explore, occupy, and claim sovereignty over those islands.[222]

Vietnam currently occupies the following islands in the Spratly Islands: Baijiao (close to Investigation Shoal), Bombay Castle, Cornwallis S. Reef, Discovery

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[220] The PRC was then a strong ally of the North Vietnam. See Haller-Trost, *supra* note 200, pp. 50-51.

[221] *Fact Sheet*, No. 2/74, South Vietnamese Embassy, Washington, D.C., 28 January 1974. Cited from Park, *supra* note 18, p. 212.

[222] Chang, "Sino-Vietnam Territorial Dispute," 28 *Asia Pacific Community* (1985) pp. 74-87.

Small Reef, Dunqianshazhou (nearby Andadao), Eldad Reef, Lizzie Weber Reef, Loaita Island, Namyit Island, Pearson Island, Sin Cowe Island, Southwest Cay, and Spratly (or Storm) Island.[223] Six hundred Vietnamese soldiers are deployed on these islets.[224] <See Map 10>

5. OBSERVATIONS

Given that the South China Sea is a semi-enclosed sea and the distance from one headland or island to another is not over 400 nm, therefore the littoral states' maritime claims inevitably create overlapping areas.[225] According to the above five states' declarations on the continental shelf and the EEZ, the following overlapping areas have emerged:

1. Malaysia - Brunei: a triangular area outside of Brunei's coast.
2. Malaysia - Indonesia: an area extending northeast from Sarawak to Kalimantan.
3. Malaysia - the Philippines - the PRC - Taiwan - Vietnam: most of the northern and central area, i.e. the Paracel Islands and the Spratly Islands.
4. Malaysia - the Philippines: a triangular area off northeast Sabah in the Celebes Sea.
5. Malaysia - Vietnam - Kampuchea - Thailand: a large part of the eastern Gulf of Thailand.
6. Taiwan - The Philippines: a triangular area in the Bashi Channel.
7. The Philippine - Indonesia: a small triangular area south of Mindanao.
8. Vietnam - Indonesia: an area north of the Natuna Islands.
9. Vietnam - Kampuchea: an area extending southwest from the disputed Phu Quoc Island.

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223 Jenkins, *supra* note 182, p. 30; *South China Morning Post* (18 March 1987) p. 21.

224 *Central Daily News* (2 December 1992) p. 4.

225 Park, *supra* note 87, p. 120.

10. Vietnam - the PRC: an area in the Gulf of Tonkin.

In view of the purpose of this research, the following chapters will focus on the areas in which the ROC is involved; that is, the disputed areas of the Bashi Channel and the Spratly Islands. With regard to the former, in trying to gain access to the South Pacific and South China Sea fishing grounds, Taiwanese fishing vessels have been captured by the Philippine navy on the grounds of 'illegal intrusion'. Problems have been compounded by the Philippine government's unwillingness to discuss or negotiate with Taiwan about the disputes, because they do not enjoy diplomatic relations. Regarding the latter, the island groups in the South China Sea are full of economic resources and strategic advantages. Because of this, the littoral states wish to control these islands, which makes the South China Sea a flash-point in the post-cold war era. Basically, the motivation for extending jurisdiction over maritime zones is control of economic resources. However, political factors, such as state recognition and sovereignty struggle, have led to the resolution being postponed.

CHAPTER FIVE

THE FISHERIES PROBLEMS IN THE SOUTH CHINA SEA

From the geographical viewpoint, if all coastal states claim the establishment of a 200-mile EEZ, the extent of the ocean area under national jurisdiction would reach approximately 31.9 million nm^2, or about 30% of the world's marine surface.[1] More importantly, over 90% of the world commercial catch in volume terms is estimated as being taken within 200 miles of land.[2] So the establishment of the EEZ is a serious matter for any distant-water fishing nation. More seriously, in a semi-enclosed sea, such as the South China Sea, the establishment of the EEZ from the littoral states creates vast and various overlapping areas. Chapter 4 explains the littoral states' maritime claims and the overlapping situations. This chapter will examine fishery disputes, one of the results from overlapping claims. Secondly, the concept of

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1 Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986) p. 3.

2 Alexander and Hodgson, "The Impact of the 200-Mile Economic Zone on the Law of the Sea," 12 *SDLR* (1975), p. 586. Also see Carroz, "The Living Resources of the Sea," in Dupuy, ed., *The Management of humanity's Resources: The Law of the Sea* (1982) p. 199; McLean and Sucharitkul, "Fisheries Management and Development in the EEZ: The North, South, and Southwest Pacific Experience," 63 *NDLR* (1988) p. 492.

'provisional arrangements' will be introduced as a resolution to conflict settlement. Thirdly, we will examine the motivation and potential for co-operation between states in the South China Sea region. According to the analysis in this chapter, fishery co-operation is the most feasible means for beginning to resolve fishery disputes resulting from overlapping claims. Finally, we shall look at what sort of accomplishments fishery co-operation can offer in the South China Sea region.

1. FISHERY DISPUTES IN THE SOUTH CHINA SEA: A CASE ON THE TAIWANESE FISHERIES

In a semi-enclosed sea like the South China Sea, littoral states' extending their maritime jurisdiction inevitably create overlapping claims and areas. This has lead to fishery disputes. Several fishery disputes between Thailand and other states are a good example to illustrate this overlapping situation. As a zone-locked state, Thailand has lost 300,000 km^2 of area where its fishing boats had traditionally fished due to its neighbouring states' claims to EEZs.[3] Moreover, Thai fishermen were detained by other states when they were operating in the other states' EEZs. The Malaysian National Maritime Co-ordinating Centre reports an average of 200 foreign boats fishing in Malaysia's EEZ every month. In 1986, 117 foreign vessels were

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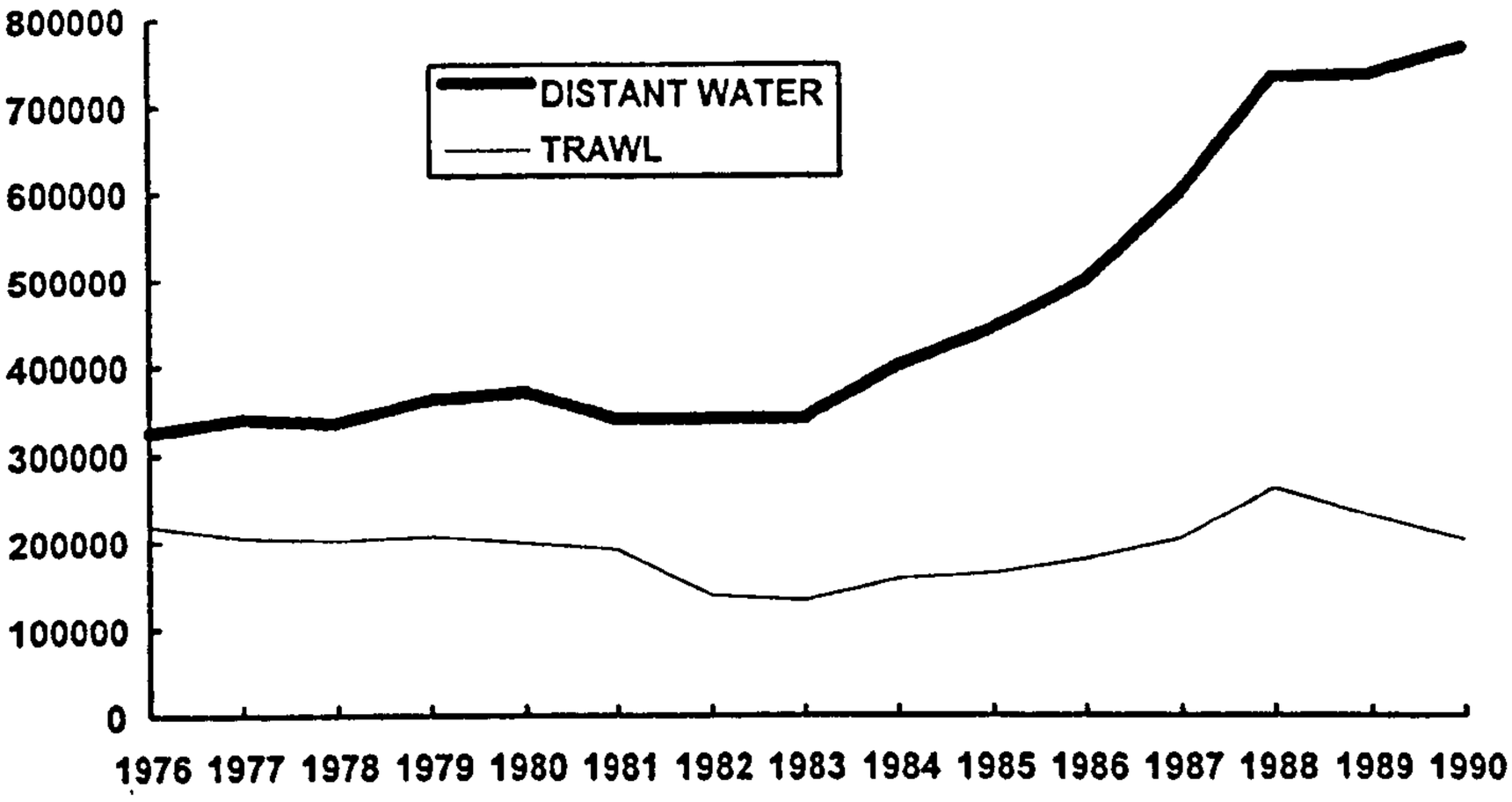
3 McDorman, "Thailand's Fisheries: A Victim of 200-mile Zones," 16 *ODIL* (1986) p. 190. Also, Saisunthorn, "Impact of 200-mile EEZ Claims on the Access of Thailand's Distant-Fishing Fleet to Foreign EEZs," Paper presented at the Workshop on Managing Potential Conflicts in the South China Sea, Bandung, Indonesia, 15-18 July 1991.

Figure 2 Production of Distant Water Fisheries and Trawl Fisheries, Taiwan.



Unit: Metric Tons
Source: *Taiwan Fishery Yearbook: 1991.*

caught while up to November 1987, 93 vessels had been apprehended.[4] The Vietnamese records reveal that, between 1983 and 1986, the Vietnamese arrested and detained 1,000 Thai fishermen. Besides, in 1992, more than 800 Thai fishermen remained in Vietnamese jails after arrests for fishing in Vietnamese waters.[5]

Taiwanese fishermen are involved in similar situations. As a distant-water fishing nation and heavily dependent on distant-water fisheries, Taiwan has

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4 Mohamed, "National Management of Malaysian Fisheries," 15 *Mar. Pol.* (1991) p. 11.

5 Valencia and Van Dyke, "Vietnam's National Interests and the Law of the Sea," 25 *ODIL* (1994) p. 231.

encountered difficulties in its fisheries development both in the South China Sea region and other fishing grounds.[6]

In the case of Taiwanese fisheries, trawl is a traditional and important fishing method for Taiwan fishing industry, but trawl fishing has to operate in sea areas where the depth is less than 200 metres. Most of these areas are now under the exclusive jurisdiction of coastal states. Obviously, owing to the international establishment of the EEZ, the operating areas of Taiwanese trawl fishery has been effectively reduced. This is demonstrated in <Figure 2>, which shows that the distant-water fisheries maintained their increasing trend from 1976-1990. Nonetheless, the growth of trawl fishery has been relatively flat.

More importantly, the extension of jurisdiction over maritime area has resulted in the seizure of Taiwanese fishing vessels by other states, especially by its neighbouring states, in areas which used to be Taiwanese traditional fishing grounds.

<Table 2> shows the instances of Taiwanese fishing vessels being seized by other countries. In terms of ocean area, there were 503 Taiwanese vessels, or the equivalent of 58.4% of the total number, seized by the Southeast Asia countries. This has proved relevant to the development of expanding jurisdiction since 1970's. The Taiwanese maintain their fishing operations in Taiwan's traditional fishing grounds

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6 It is reported that the announcements of 200-mile EEZs and/or fishing zones by various coastal states threaten to decrease about 50% of the fish catching of Taiwan's distant water fisheries. See Dellapenna and Wang, "The Republic of China's Claims Relating to the Territorial Sea, Continental Shelf, and Exclusive Economic Zones: Legal and Economic Aspects," 3(2) *Boston College ICLR* (1980) p. 365.

but those grounds are declared to be EEZs or fishery zones under its neighbouring states' jurisdiction. The Philippines claimed its EEZ in 1978 while Indonesia claimed its in 1980.[7] This corresponds to the number of Taiwanese vessels seized between 1979 and 1980 when the number of seizures peaked.

The records show that those seized vessels were impounded for 'illegal intrusion to territorial sea', 'illegal fishing in the exclusive economic zone', or 'smuggling'.[8] On the other hand, fishermen defended themselves by claiming to have been 'drifting into territorial sea because of engine breakdown', 'being arrested in high seas', and '*force majeure* from bad weather.'[9] The ROC Minister of Foreign Affairs, Fu-Sung Chu, gave several reasons why Taiwanese fishing vessels were seized by other countries: A. entry into territorial sea by accident; B. seizure on the high seas by mistake; C. illegally intruding into territorial sea or EEZ; D. operation not in accordance with the initial agreement; E. illegal fishing methods, i.e. electric shock or bombing; F. non payment of fees; G. a small minority of crewmen being suspected of breaching local law.[10] According to the statistics by the Overseas Fisheries

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7 For Philippine declaration, see Philippine Presidential Decree No. 1599 of 11 June 1978, *Establishing An EEZ and for Other Purposes*, in UN, *The Law of the Sea: National Legislation on the Exclusive Economic Zone* (1993) pp. 268-269; for discussion on the Philippine maritime claims, see *supra* Chapter 4, Sub-Section 3.3. For Indonesian declaration, see Indonesian Declaration concerning the Exclusive Economic Zone of 21 March 1980, in UN, *National Claims to Maritime Jurisdiction* (1992) p. 66.

8 *China Times* (24 January 1989) p. 3.

9 *Ibid.*

10 Report of the Minister in the Foreign Affairs Committee, Legislative Yuan (10 June 1986).

Development Council of the ROC, the most common reason was intruding into territorial sea or EEZ without the consent of the foreign government. Over 90% of the cases were based on this.[11]

With respect to the discussion above, it is clear that 'illegal fishing' or 'reckless intrusion' is a common phenomenon in the South China Sea region. This stems primarily from the littoral states extending their jurisdiction claims and the inevitable overlapping of maritime areas. The following sections focus on feasible solutions to these problems and the possibilities for co-operation in this region.

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11 Chang, "Prevent the Fishing Vessels Being Seized," *Fisheries Extension* (June 1991) pp. 9-10. For example, in *People of the Philippines* v. *Kwan Un Diong* case, a Taiwanese fishing vessel, *Bien Dim Huet*, and five accused fishermen were found within the Philippine territorial sea about ten miles northwest of Dequey Island, Sabtang, Batanes, the northernmost province of the Philippines. On 6 June 1988, the accused pleaded guilty to the charge of illegal entry. Under this, the Court found the accused guilty and sentenced each of the accused to a penalty of forty-five days imprisonment and imposed a fine of five hundred pesos. See Criminal Case No. 584, Republic of the Philippines, Regional Trial Court, Second Judicial Region, Branch XIII, Batanes, 22 June 1988. Cited from Fu, "Trespassing Taiwanese Fishing Vessels in Some ASEAN States Waters," 24(1) *UBCLR* (1990) pp. 109-110. Cf. *Indonesia* v. *Twenty-three Taiwanese Fishermen on Chiao Tai No. 1 & 2,* The Supreme Court of Indonesia, 1338 K/PID/1988, 8 September 1988; *Indonesia* v. *Sixteen Taiwanese Fishermen on The Kn Hsu Chun No. 1,* Local Court of Ambon, Pasal 193 ayat (1) KUHAP, No. 39/PID.B./1987/PN.AB, 3 February 1988.

Table 2 Seizure of Taiwanese Fishing Vessels (1977-1994)

	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	TOTAL
SOUTHEAST ASIA AREA																			503
Indonesia	23	10	12	52	18	12	13	3	12	10	19	4	4	2	6	4	4	10	218
Malaysia									2	2	1	11	1		3				20
Philippines	13	6	15	59	21	4	14	9	5	5	6	21	13	5	9	9	15	6	235
Thailand												3							3
Vietnam	2	3	2	1				2	1		1		1	5	5		2	2	27
NORTH PACIFIC OCEAN AREA																			**171**
Japan			34	23	13	9	14	7	14	5	9	1	4	1	2		4	4	144
U.S.A.					2	2		1	1										6
Russia						2	2	2		2	2	3	2	3	3				21
SOUTH PACIFIC OCEAN AREA																			**114**
Australia	11	8	9	3	4	1	4	2	4			2		3		1	3		55
Cook Islands														3					3
Marshall Islands											1								1
Micronesia						1		3				6	3	1			1		15
Palau			3	1	4		1	1	1	3		1	2				1		18
Papua New Guinea		2	1								1		2			4		1	11
Solomon Islands						1	1				1							1	4
Tonga														3					3
Vanuatu													1		2		1		4
INDIAN OCEAN AREA																			**70**
Bangladesh													2						2
India			9	10	9			11		1		2		2		2	3		49
Maldives Islands								2		1									3
Pakistan				2	5								2	2					11
Somalia													2			2		1	5
ATLANTIC OCEAN AREA																			**10**
Argentina												4	-		1	3		1	9
Brazil													1						1
Annual Total	**49**	**29**	**85**	**151**	**76**	**32**	**49**	**43**	**40**	**29**	**41**	**58**	**40**	**30**	**31**	**25**	**34**	**26**	**868**

Source: Overseas Fisheries Development Council of the ROC.

2. PROVISIONAL ARRANGEMENTS AND THE RESOLUTION OF THE SOUTH CHINA SEA DISPUTES

Theoretically, states with maritime jurisdiction disputes should seek agreements to reach an equitable solution, a delimitation would be preferable. However, reality is not at all like this. Some of the disputes, like the disputes that have occurred in the South China Sea are highly political, which hampers resolution. At the same time, however, the relevant parties in the South China Sea region are trying their best to consolidate their positions in the disputed area, especially the Spratly Islands. Moreover, without appropriate co-operation, the utilisation of resources cannot be maximised. All these are diametrically opposed to the spirit of the EEZ. In order to resolve the disputes and utilise the resources, a provisional arrangement or a *modus vivendi*, pending final resolution seems most feasible. The 1982 LOSC offers a working procedure for this. According to the stipulation in Article 74 of the LOSC,

> 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statue of the International Court of Justice, in order to achieve an equitable solution.
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

At this stage, it seems that none of the relevant parties would like to refer to the time-consuming judicial settlement. Nonetheless, the current situation in the South China Sea could hinder the development and management of resources. Much worse, the military build-up could have the practical effect of creating a moratorium on economic activities in such an area.[12] On the other hand, once boundaries are fixed, they are, in general, final and permanent. Hence, it would be unwise to conclude a delimitation in haste without adequate consideration of all the potential effects upon the national interest of the states involved.[13] Accordingly, entering into a provisional arrangement becomes the most practical way to solve the problem.

It is noteworthy that, during the period of provisional arrangements, not only the arrangement itself should not hamper the final resolution, but also each of the parties should control itself so that a provisional arrangement could operate between states in dispute to keep the disputes under control or, at least, to avoid any aggravation of conflict. The conflict should be managed so that every incident happening during the provisional period can be treated as juridical neutral. In other words, those incidents, if any, would not harm or help the position of either side. Furthermore, if the states in dispute agree, they could explore and exploit the resources without touching upon the issues of delimitation or sovereignty, that is, distinguishing the issue of sovereign rights from the one of sovereignty. Therefore, for the best result, states in dispute should:

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12 See *infra* Sub-Section 4.1.

13 Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (1987) p. 103.

A. Initiate negotiations in good faith or *bona fide*. Under the first part of Articles 74 and 83, paragraph 3, the states concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature. The phrase, 'in a spirit of understanding and co-operation', reveals that the parties concerned should negotiate with a spirit of good faith or *bona fide*.

The obligation to seek agreement in good faith is defined in many well-established precedents of international juridical cases. In the 1969 *North Sea Continental Shelf* Cases, the Court stated,[14]

> [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; *they are under an obligation so to conduct themselves that the negotiations are meaningful*. [emphasis added]

The Court went on to state that this obligation "is moreover recognised in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes."[15] Nonetheless, the Court also mentioned that an obligation to negotiate did not imply an obligation to reach an agreement.[16]

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14 *North Sea Continental Shelf* Cases, *I.C.J. Reports 1969,* para. 85(a). Similarly, in the *Gulf of Maine* Case, the court said that the parties were under duty to negotiate "and to do so in good faith, with a genuine intention to achieve a positive result." See *I.C.J. Reports 1984,* paras. 87, 112. Cf. White, "The Principle of Good Faith," in Lowe and Warbrick, eds., *The UN and the Principles of International Law* (1994) p. 230.

15 *North Sea Continental Shelf* Cases, para. 86.

16 *Ibid.*, para. 87.

Furthermore, the words, 'shall make every effort', indicate that this requirement is not merely a recommendation or encouragement, but a mandatory rule whose breach would represent a violation of international law. The states concerned are obliged not to undertake specific actions but to endeavour to reach an agreement on interim measures.[17]

B. Self-restraint. Needless to say, even if the parties reach a final agreement, they still have to control themselves not to take any action which would make the dispute much worse. That is to say, mutual restraint should be exercised pending final agreement or settlement in order not to impede the completion of the final delimitation.[18] Only under such presumption, can the arrangement correspond to the spirit of the provision, 'not to jeopardise or hamper the reaching of the final agreement'.

In addition, two aspects of the provisional arrangements should not be overlooked:

A. Transitional nature. For international peace, the states concerned shall enter into provisional arrangements so as not to jeopardise or hamper the reaching of the final delimitation. Thus, the obligation to seek a solution of the dispute through peaceful

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17 Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," 78 *AJIL* (1984) p. 354.

18 Report by the Chairman of Negotiating Group 7 on the Work of the Group at Its 17th-27th Meetings, NG7/24, 14 September 1978, in UNCLOS III, *Official Records*, Vol. X (1978) p. 171.

means has not been eliminated by that interim agreements.[19] Because they are characterised as 'provisional', the arrangements are interim and they are preliminary or even preparatory to the final agreed status of the area and the utilisation of its resources. The interim measures could not be interpreted as constituting a bar to, or setting up any limitation on, the pursuit before the court.[20]

In the case of 'Interim Agreement in the Fisheries Dispute between the UK and Iceland, 13 November 1973', the Court said that[21]

> [The Interim Agreement] was an interim agreement, that it related to fisheries in the disputed area, that it was concluded pending a settlement of the substantive dispute, and that it was without prejudice to the substantive dispute.

Thus, so long as the dispute continues or exists, the final settlement is regarded as pending. The parties meanwhile maintain their legal rights and claims as well as their respective positions in the conflict.[22] In the absence of the express consent of the parties, one cannot assume that they accept or acquiesce in the arrangements as final; and they are not prevented from taking any position in the negotiations on the final agreement that cannot be squared with the provisional arrangement.[23]

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19 *Fisheries Jurisdiction* Case, *I.C.J. Reports 1974*, para. 76.

20 *Ibid.*, para. 37.

21 *Ibid.*

22 *Ibid.*

23 Lagoni, *supra* note 17, p. 359.

B. Practical nature. Because the provisional arrangement is of a practical nature, it focuses on the practical issues, i.e. utilisation of resources, and puts the delimitation and sovereignty issues aside. Additionally, owing to its practical nature, a provisionally arranged fishing zone would have no relevance, for example, to a hydrocarbon area in question. To be specific, the utilisation of living resources is separate from the utilisation of non-living resources.

3. MOTIVATION TO PROCEED CO-OPERATION

3.1. ECONOMIC INTERACTIONS

In view of the multilateral relations among the South China Sea littoral states, current trends should favour greater co-operative engagement and the avoidance of further conflict. Since the mid-1980's, economics has played an increasingly important role in the relations among the littoral states, which is an important catalyst in boosting co-operation.[24]

Among the South China Sea littoral states, the PRC has the greatest capacity to undermine strategic stability in the region should it resort to force to assert its authority over the remaining South China Sea territories which it claims but does not

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24 Klintworth, "Asia-Pacific: More Security, Less Uncertainty, New Opportunities," 5 *P. Rev.* (1992) pp. 221-231; Rosencrance, *The Rise of the Trading State* (1986).

occupy.[25] Nonetheless, the PRC has little to gain by resorting to military force in pursuit of its South China Sea claims but much to lose. In addition, conflict could further complicate its modernisation efforts at a time of great domestic stress. Conflict would also have wider ramifications for the regional economy by negatively impacting shipping, telecommunications, and resource exploration and exploitation. It would reduce transnational coalition opportunities among regional states and could lead to the diversion of scarce capital resources away from economic development to defence. Finally, it could encourage Japan to pursue a regional security role, a possibility which because it would create a challenging new regional security dynamic, has become Beijing's main external security concern.[26]

Vietnam is the other state which claims all the islands in the South China Sea and has clashed with all the others involved in the conflict. Its military encounter with the PRC in March 1988 in the Spratlys[27] signalled to the world that the area could be a major flashpoint in the Asia-Pacific region. Nonetheless, in view of Vietnam's internal affairs, it seems that the tension between Vietnam and the other

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25 For the discussion on military build-up in this area, see discussion in *infra* Sub-Section 4.1.

26 Polomka, "Strategic Stability & the South China Sea: Beyond Geopolitics" (1990) pp. 3-5.

27 In March 1988, the PRC navy encountered Vietnamese supply forces in a brief naval engagement, sinking three transport vessels and killing 72 Vietnamese troops. The PRC subsequently took possession of several insular features. Garver, "China's Push Through the South China Sea: The Interaction of Bureaucratic and National Interests," 132 *China Q.* (1992) pp. 1012-1014.

claimants in the South China Sea conflicts could be contained with the situation there being less explosive. Hanoi would need peace in order to focus on its domestic economic and social development. As a result, Vietnam has embarked upon a comprehensive renovation of its economic, political, and foreign policies. As far as foreign policy is concerned, Vietnam is seeking more trade and investment, and a peaceful environment for its socio-economic development. It is in this context that overtures were made to normalise relations with the US and improve relations with the ASEAN states and the PRC. In the case of the ASEAN states, it seems that Vietnam is keen to concentrate on steps in confidence building by having contacts at all levels and different forms of co-operation with ASEAN states.[28] In the case of the PRC, it was known that Hanoi was ready to hold high-level talks with Beijing on officially reopening their common border. Vietnam also wanted to re-establish the rail link between Hanoi and Beijing.[29]

3.2. RELATIONS BETWEEN TWO CHINESE GOVERNMENTS

As far as relations between the PRC and ROC are concerned, it is interesting to see that they have taken on a co-operative, yet delicate, character. In some ways, the Taiwanese presence on Itu Aba Island since the 1950's has helped the Chinese claims in the area. The PRC government stated, more than once, that the Taiwanese garrison

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28 Tran, "For A New Southeast Asia" (1991) p. 5. Vietnam had been accepted as a new member of the ASEAN in July 1995. See Gallagher, "China's Illusory Threat to the South China Sea," 19(1) *IS* (1994) p. 192.

29 *Foreign Broadcast Monitor*, No. 145/91 (27 June 1991) p. 5.

on Itu Aba island had maintained the interests for all Chinese.[30] Obviously, the PRC's position on the Taiwanese garrison implied that the troops from Taiwan are a legitimate Chinese occupation force which enforces Chinese claims.[31] It should be noted that Taipei's Defence Minister at one point during the 1988 Sino-Vietnamese clash in the Spratlys said that if Taiwan were asked by China to help defend the Spratly Islands against a third party, it would be prepared to do so.[32] Since both Beijing and Taipei maintain that there is only one China, it is possible that there is room for co-operation between the two sides of the Taiwan Strait for the benefit of both when coming to the claims to the isles in the South China Sea. In fact, it has been noted that Taiwan by itself cannot be expected to protect its interests on the Spratlys and that "it may well have to seek some kind of agreement with the PRC" on the Spratly issue.[33]

This possibility is reflected in the increased relations between the two Chinas in recent years.[34] In October 1987, the late ROC President Chiang Ching-Kuo agreed to lift the ban on Taiwan residents' visits to their relatives on the Chinese mainland.[35]

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30 *Beijing Review* (4 February 1974) p. 3 and (18 February 1980) p. 18.

31 Muller, *China as a Maritime Power* (1984) pp. 220-221.

32 Hoon, "Blood Thicker than Politics," *FEER* (5 May 1988) p. 26.

33 Yu, "Reasons for not Negotiating and Negotiating (Away) the Spratlys: A Chinese View from Taiwan" (1990) p. 11; Gao, "The South China Sea: From Conflict to Cooperation?" 25 *ODIL* (1994) p. 354.

34 Jai, "Changing Relations Across the Taiwan Strait," 32 *AS* (1992) pp. 277-289.

35 Ma, "Thousands of Taiwan Residents Packing for Trip to Mainland," 4(42) *FCJ* (26 October 1987) p. 1.

On 13 January 1988, President Chiang passed away and Vice-President Lee Teng-Hui succeeded to the Presidency. President Lee extended the aforementioned policy, under which the mainland residents are allowed to visit their sick relatives in Taiwan or to attend their funeral services. Mail exchanges through Hong Kong were permitted.[36] Under this pretext, thousands of Taiwanese businessmen rushed to China, causing Taiwanese trade and investment in China to soar. The total volume of trade between 1979 and 1986 was about four billion US dollars. Between 1987 and 1992, total indirect trade between Taiwan and China was over 20 billion US dollars, with Taiwan enjoying a trade surplus of 16 billion dollars. However, this figure is misleading because it fails to take into account the money spent by Taiwan people on their 4.2 million visits to China, and the money remitted by Taiwan residents to help their relatives or friends in China.[37] As for Taiwanese investment in China, it is difficult to estimate, but it is believed that total investment may be as high as 10 billion dollars, with growth expected to continue.[38]

Changes in economic relations between Taiwan and China have accompanied other transformations. A formal channel for official communication, the Straits

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36 *The Chinese Nationalist Party's Policy toward the Mainland at the Present Stage* (Chinese Nationalist Party's Council on Culture Affairs of the Central Committee: Taipei, 1988). Cited from Chiu, "The International Order and Intra-Chinese (Taiwan-Mainland) Relations," 10 *CYILA* (1990-91) pp. 14-15.

37 Chiu, *Koo-Wang Talks and the Prospect of Building Constructive and Stable Relations Across the Taiwan Straits* (1993) p. 7.

38 *Ibid.*, p. 8. In 1990, Beijing announced that Taiwan has replaced the US and Japan as the largest investor in China. See Hickey, "China's Threat to Taiwan," 5 *P..Rev.* (1992) p. 255. Cf. Huan, "China's Foreign Economic Relations," 519 *Annals AAPSS* (January 1992) pp. 176-190.

Exchange Foundation (SEF), although claimed by the ROC government to be non-official, was established on 28 April 1991.[39] According to the ROC government, the SEF was established to carry out non-official contacts and negotiations with the Chinese communist authorities in the mainland.[40] In response to Taipei's SEF, the PRC decided to establish a counterpart organisation to the SEF, the Association for Relations Across the Taiwan Straits (ARATS), on 6 December 1991. According to the Deputy Chairman of the ARATS Tang Shu-Pei,[41] the Association would work to strengthen non-official contacts and exchanges, team up with the relevant organs in Taiwan to crack down on maritime smuggling and piracy, and settle disputes between the two sides.[42] Basically, SEF and ARATS are official organisations but with non-official cover. Under this structure, both parties can avoid sensitive political issues, such as the 'One China Policy', and concentrate on the resolution of practical affairs,

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39 The SEF is funded two-thirds by the ROC government and one-third by private contributions.

40 "Co-ordinating Mainland Affairs," 8(14) *FCJ* (25 February 1991) p. 1. The SEF is authorised specifically to undertake the following tasks:

1. Accepting, ratifying, and forwarding entry and exit documents from the two sides of the Straits;
2. Verifying and delivering documents issued on the mainland;
3. Deporting fugitives on the two sides of the Straits;
4. Arbitrating trade disputes;
5. Promoting cultural and academic exchanges;
6. Providing consultation on general affairs;
7. Helping protect the legal rights of ROC citizens during their visits to the mainland;
8. Dealing with other affairs commissioned by the ROC government.

41 Tang Shu-Pei is the former PRC consul-general at San Francisco.

42 "Association Founded for Taiwan Contacts," *Beijing Review* (30 December 1991) p. 5.

such as resolving trade disputes and promoting cultural exchanges. This 'private' character is evident in the first talks between chairmen Koo and Wang of the two organisations in 1993.[43]

On 3 April 1993, the secretary-general of the SEF Chiu Chin-I[44] led a delegation to Beijing to hold a preparatory meeting with the ARATS. At the 11 April 1993 preparatory meeting, both parties agreed that the Koo-Wang Talks would be non-governmental, practical, economic, and functional in nature. The purpose of the talks would be to establish a channel for liaison and negotiation to resolve problems evolving from private exchange, and to boost economic, cultural, and technological interaction.[45] The talks took place in Singapore from 27 to 28 April 1993. At the conclusion of the talks, four agreements were reached: the Agreement on the Use and Verification of Certificates of Authentication (Notarisation) Across the Taiwan Straits, the Agreement on Matters Concerning Inquiry and Compensation for Lost Registered Mail Across the Taiwan Straits, the Agreement on the System for Contacts and Meetings Between the SEF and ARATS, and the Joint Agreement of

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43 The first talk is also known as 'Koo-Wang Talks'. Koo Chen-Fu is the Chairman of the SEF, the Chairman of the ROC National Association of Industry and Commerce, and a member of the KMT Central Standing Committee. Wang Tao-Han is the Chairman of the ARATS and the former Mayor of Shanghai.

44 Chiu Chin-I is a former diplomat and former deputy secretary-general of the ROC Presidential Office.

45 Yu, "Singapore Koo-Wang Talks Date Set," 10(26) *FCJ* (13 April 1993) p. 1.

the Koo-Wang Talks.[46] Although the core issue separating the PRC and the ROC, which is the reality of two separate entities, has not been solved officially, the establishment of the SEF and the ARATS can be treated as a stage in building confidence, which is positive for regional stability.

However, owing to Taiwan's first presidential election by direct vote in March 1996 and its democratic development, China launched a series of military exercises in waters adjacent to Taiwan.[47] Although China's intimidation did not work and a Taiwanese president was elected as scheduled, the conflict between Taiwan and China had become a major issue in Southeast Asia.

3.3. CONSENSUS ON PEACEFUL SETTLEMENT OF DISPUTES

Regarding peaceful settlement of disputes in the South China Sea, the parties concerned have expressed a willingness to settle disputes through peaceful means, particularly after the 1988 clash between the PRC and Vietnam.[48] In January 1990, Indonesia hosted a non-governmental workshop of academics and officials from the ASEAN states to discuss the management of potential conflicts in the South China

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46 For English translation of the four Agreements, see 32 *ILM* (1993) p. 1217. For the discussion on Koo-Wang Talks, see Chiu, *supra* note 37.

47 *Hsinhua* (Beijing, 5 March 1996 and 10 March 1996).

48 Chang, "A New Scramble for the South China Sea Islands," 12(4) *Contemporary Southeast Asia* (1990) pp. 30-31.

Sea.[49] An agreement was reached at this meeting that all relevant South China Sea parties should be invited to a second workshop.[50] Besides, this kind of workshop mechanism is essentially an unofficial process, not constituting formal or informal negotiation. Hosted and co-chaired by the Indonesian Foreign Ministry, the invited participants were academics and officials, participating in their personnel capacities, from the six ASEAN states, Laos, the PRC, Taiwan, and Vietnam.[51] The agenda covers a broad range of South China Sea topics, thus avoiding undue attention being given to the most contentious issue, the Spratly islands. The process is designed to allow for a full and frank discussion of issues without the restrictions imposed by formal negotiations. Therefore, the process could provide an innovative format for exploring sensitive issues.[52]

The second informal workshop was held in July 1991 in Bandung, Indonesia. At this meeting, both the PRC and Taiwan were invited to participate.[53] A statement

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[49] Djalal, "Potential Conflicts in the South China Sea: In Search of Cooperation," 18 *IQ* (1990) pp. 127-132.

[50] Vatikiotis and Cheung, "Maritime Hegemony," *FEER* (10 January 1991) p. 11; "Report of the Workshop on Managing Potential Conflicts on the South China Sea," 5 *FRJ* (1990) pp. 125-145.

[51] Sukma, "South China Sea Conflict: A Challenge to Indonesia's Active Foreign Policy," 19 *IQ* (1991) pp. 303-309; McDorman, "The South China Sea Islands Dispute in the 1990s - A New Multilateral Process and Continuing Friction," 8 *IJMCL* (1993) pp. 274-275.

[52] McDorman, *ibid.*; Agoes, "Managing Potential Conflicts in the South China Sea: An ASEAN Venture," (1990) pp. 1-3.

[53] Although the PRC Foreign Ministry spokesman states the participation of Chinese experts in the talks did not signal any change on China's 'indisputable' sovereignty over the Spratly and Paracel Islands. See *Keesing's* (1991) p. 38346.

was released after this meeting in which the participants agreed to recommend to the relevant governments that[54]

> [I]n areas where conflicting territorial claims exist, the relevant states may consider the possibility of undertaking co-operation for mutual benefit, including exchanges of information and joint development, ... any territorial and jurisdictional dispute in the South China Sea area should be resolved by peaceful means through dialogue and negotiation, ... force should not be used to settle territorial and jurisdictional disputes, and ... the parties involved in such disputes are urged to exercise self-restraint in order not to complicate the situation.

A Third Workshop was convened on 29 June 1992, the participating states reaffirmed the points agreed to at the Second Workshop.[55]

On 22 July 1992, the ASEAN Ministerial Meeting issued a joint Declaration on the South China Sea issues[56] which again calls on the relevant states to

> resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force; exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes; and explore possibility of co-operation in the South China Sea.

The six member states of the ASEAN also declared that they recognised that the South China Sea issues involved sensitive questions of sovereignty and jurisdiction of the parties directly concerned. They were conscious that any adverse

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54 Statement of the Workshop on Managing Potential Conflicts in the South China Sea, Bandung, Indonesia, July 1991. (mimeo.)

55 Statement of the Workshop on Managing Potential Conflicts in the South China Sea, Yogyakarta, Indonesia, 2 July 1992. (mimeo.)

56 Reprinted in McDorman, *supra* note 51, p. 285; also see Gao, *supra* note 33, p. 351.

developments in the area may directly affect peace and stability in the region.[57] Therefore, the meeting urged all claimants to settle disputes peacefully and called for regional co-operation in furthering safety of navigation and communication, pollution prevention, search and rescue, and combating piracy and drug smuggling.

As regards the peaceful atmosphere in this region, it is encouraging for the littoral states to construct a co-operative environment and solve disputes peacefully. Indeed, that states should solve their disputes through peaceful means rather than military measures is an important and absolute requirement of international law.[58] Co-operation, not confrontation, becomes the main trend of international politics in the post-cold war era. The South China Sea region cannot be out of keeping with this main trend. In view of this, the messages from the PRC and the ROC are encouraging. PRC Premier Li Peng declared, on the First Meeting of the Eighth National Assembly of 15 March 1993, that the PRC would like to take the position of "shelving the disputes, jointly developing the resources."[59] A couple of days later, interviewed by a CNN correspondent on 26 March, ROC President Lee Teng-hui also announced that "[The littoral states] could take joint development of resources into consideration so that the potential factors of conflict can be eliminated."[60] Until now,

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57 Viewing the military build-up in the region, the 'adverse developments' might imply the strengthening of naval power. See *infra* Sub-Section 4.1.

58 UN Charter, Articles 2(3) and 33.

59 *China Times* (16 March 1993) p. 1. Also see Lee, "Domestic Changes in China Since the 4 June Incident and Their Implications for Southeast Asia," *Contemporary Southeast Asia* (June 1991) p. 39.

60 *China Times* (6 April 1993) p. 1.

all relevant parties have shown their interest in peacefully eliminating conflicts through co-operation.

4. THE POSSIBILITIES OF CO-OPERATION IN THE SOUTH CHINA SEA

In the conclusion of the 1990 Workshop on Managing Potential Conflicts in the South China Sea, several areas were identified as most practicable for developing co-operation in the South China Sea including: protection of the marine environment, particularly the expansion of contingency plans for marine pollution control; marine scientific research; navigational safety; and marine resource management.[61] In other words, these suggestions and efforts at co-operation can be divided into the following groups: those concerning environmental protection, such as contingency plans for marine pollution control; those concerning economic factors, such as marine resource management; and others concerning scientific research. If each single item can be linked, a basic co-operation structure can be constructed. Apart from these suggestions, many scholars also suggest using transparency in military activities as a means of confidence building.[62] A Working Group Meeting on Marine Scientific Research in the South China Sea had already been organised in Manila from 30 May

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61 "Report of the Workshop on Managing Potential Conflicts in the South China Sea", Bali, 22-24 January 1990.

62 Hamzah, *The Spratlies: What Can Be Done to Enhance Confidence* (1990) p. 15.

to 3 June 1993.[63] The following discussions will examine three potential areas of co-operation from a political and economic perspective so as to select the most feasible area to start working on.

4.1. MILITARY CO-OPERATION

Following the commencement of the post-cold war era, the PRC, which seeks to fill the power vacuum, seems to be the potential threat to the stability and the security of this region.[64] The PRC, as a major regional power, has always played an important role in international politics in this region, and every move it makes carries tremendous political significance. Since 1985 the PRC has accelerated its naval modernisation programme and increased its naval activities in the South China Sea region.[65] The PRC's military budget increased by 15.5% in 1990, by nearly 13% in 1991, by 12% in 1992, by 22.4% in 1994, and by 21% in 1995. Besides, the PRC

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63 See 'Statement of the Working Group Meeting on Marine Scientific Research in the South China Sea', Manila, Philippines, 30 May - 3 June 1993. (mimeo.)

64 Burton, "What Kind of Defence?" *Time* (17 May 1993) pp. 48-49; Chanda, "South China Sea: Treacherous Shoals," *FEER*, 13 August 1992, pp. 14-17; Cheung, "Loaded Weapons: Spree in Former Soviet Union," *FEER* (3 September 1992) p. 21; Haller-Trost, *The Spratly Islands: A Study on the Limitations of International Law* (1990) pp. 6-9; Leong, "The Changing Political Economy of Taiwan - Southeast Asia Relations," 6 *P. Rev.* (1993) p. 38; Simon, "The Two Southeast Asias and China," 24 *AS* (1984) p. 519. Also, Frieman, "China's Defence Industry," 6 *P. Rev.* (1993) p. 50-62.

65 You and You, "In Search of Bule Water Power: The PLA Navy's Maritime Strategy in the 1990s," 4 *P. Rev.* (1991) pp. 137-149; Mak, "The Chinese Navy and the South China Sea: A Malaysian Assessment," 4 *P. Rev.* (1991) pp. 150-161.

also spends an increasing greater share of its defence budget on the navy.[66] In an assertive tone, Beijing has declared that China 'reserves the right to recover' the Spratlys 'at an appropriate time.'[67] Its South China Sea fleet has developed Hainan as one of its forward bases not only to project power in the area but also as a staging base for naval patrols.[68] Furthermore, the PRC's acquisition of aerial-refuelling technology, the newly completed military air base on Woody Island in the Paracel Islands, and the purchase of a squadron of twenty-four long-rang SU-27 fighters from Russia have enabled it to extend its air cover over the Spratly Islands area.[69] It is clear that the PRC has acquired the necessary capabilities to extend its influence in this region.

In view of the PRC's actions in the South China Sea, it suggests that the PRC is working to obtain control of the islands in this area. In a swift military operation in 1974, the PRC captured the Paracel Islands from South Vietnam.[70] Construction in

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66 Cheung, *Growth of Chinese Naval Power: Priorities, Goals, Missions and Regional Implications* (1990) pp. 58-59; Gao, *supra* note 33, p. 348; Kristof, "China's Military Outlays Fan the Region's Fears," *International Herald Tribune* (19 March 1993) p. 6; Park, "Multilateral Security Cooperation," 6 *P. Rev.* (1993) p. 258; Pringle, "Fears Grow in the South-East Asia: China Increases Military Spending," *The Times* (7 March 1995) p. 11.

67 *Straits Times* (16 April 1987) p. 36, and (23 April 1987) p. 19; "Senior Officer Outlines China's Naval Ambitions," *FEER* (16 April 1992) p. 14.

68 *Straits Times* (7 April 1992) p. 4; *AP*, Manila, 6 April 1992. Lee, "Chinese Maritime Power and Strategy in the South China Sea," (1990).

69 Gao, *supra* note 33, p. 348; Zang, "China Goes to the Blue Waters: The Navy, Seapower Mentality and the South China Sea," 17 *JSS* (1994) pp. 198-199.

70 Lo, *China's Policy Towards Territorial Disputes: The Case of South China Sea Islands* (1989) pp. 53-63.

the Paracel Islands was given top priority, supported by the Central Military Commission and the People's Liberation Army General Logistics Department, which guaranteed the necessary financial and material resources.[71] This would make the Paracel Islands the stepping stones for the PRC's advance further south to the Spratly Islands. In late April 1987, the New China News Agency further revealed that the Chinese navy had already acquired the capability to patrol the Spratly Islands and in fact had completed a comprehensive tour of the archipelago and even conducted a modern amphibious exercise on one of the islands.[72] Furthermore, from mid-October to the end of November 1987, the Chinese navy carried out a series of exercises in the Spratlys which extended as far as James Shoal. The series of naval exercises was explicitly designed "to enhance the navy's capacity to carry out medium- and long-distance operation" and demonstrated China's capability to wage battle away from its home shores.[73] In 1988, the PRC captured six atolls of the Spratly Islands from the Vietnamese again.[74] On 8 February 1995, the Philippine President Fidel Ramos protested to Beijing that the Chinese forces had set up a base on one of the reefs of the Spratly Islands, Mischief reef, over which the Philippines also claims sovereignty. Chinese warships were also in the area, 135 nm west of the Philippine island of Palawan.[75] The PRC Foreign Ministry Spokesman Chen Jian confirmed

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71 Garver, *supra* note 27, p. 1005.

72 *United Morning Post* (22 April 1987) p. 17.

73 *Straits Times* (4 December 1987) p. 3.

74 Garver, *supra* note 27, pp. 1012-1014..

75 *Keesing's* (1995) p. 40412.

that structures had been built on the reef by China. But he said that they were aimed at ensuring the safety and lives, as well as production operations, of the fishermen who work in the waters of the Spratly Islands. Besides, he emphasised that the Chinese side never established any military base on Mischief reef.[76]

All these actions illustrate the PRC's interests and ambition in the South China Sea. As <Table 3> illustrates, the PRC seems to be steadily building the kind of blue-water navy capability which is much stronger than that of other littoral states, and which could enable it to assert its claim on jurisdiction over the South China Sea.

Inevitably, the PRC's action provoked a counter response from other littoral states, because they are concerned that the PRC might resort to its predominant military force to resolve long-standing boundary disputes in its favour. Therefore, military build-up has become an unavoidable and important phenomena in Southeast Asia. Based on the potential threat from the PRC, the other littoral states would resort to buying modern frigates, combat aircrafts, and other weapons incorporating advanced high technology as a counter measure.[77]

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[76] Chanda, et al., "Territorial Imperative," *FEER* (23 February 1995) p. 14. The PRC and the Philippines held a three-day bilateral talks on the disputed Spratly Islands in Beijing from 20 March 1995, but no agreement was achieved. *Reuters*, Beijing, 22 March 1995; Tasker, "A Line in the Sand," *FEER* (6 April 1995) p. 14.

[77] Ball, *Building Blocks for Regional Security: An Australian Perspective on Confidence and Security Building Measures in the Asia/Pacific Region* (1991) p. 16; Ching, "China's Military Spurs Concern," *FEER* (11 May 1995) p. 11; Klintworth, "Asia-Pacific: More Security, Less Uncertainty, New Opportunities," 5 *P. Rev.* (1992) p. 226; Lee, "Managing Potential Conflicts in the South China Sea: Political and Security Issues," 18 *IQ* (1990) pp. 154-158; Park, *supra* note 66, pp. 258-259.

Table 3 Southeast Asian Naval Capabilities, 1993

NATION	MANPOWER	COMBAT TONNAGE	SUBMARINES	PSC	AFLOAT SUPPORT RATIO
CHINA	202	245	45	56	0.63
INDONESIA	31	42.3	2	17	0.12
MALAYSIA	12	7.8	0	4	0
PHILIPPINES	14.5	1.75	0	1	0
SINGAPORE	4.5	0	0	0	0
TAIWAN	30	116	4	33	0
THAILAND	40.8	15.9	0	9	0.11
VIETNAM	12	10.4	0	7	0

Note: 1. Combat Tonnage: all submarines and surface combatants above 1,000 tonnes displacement.
2. PSC (Principal Surface Combatants, ships with 1,000 tonnes displacement).
3. Afloat Support Ratio: the sustainability of the nation's surface forces in a prolonged conflict remote from their national bases. A ratio of 0.20 or better indicates a good level of sustainability; 0.10 or less, poor.

Source: *The Military Balance, 1993-1994* (The International Institute for Strategic Studies: London, 1993).

According to the International Institute for Strategic Studies (IISS), a London based academic institute, major naval orders have been placed or are being planned by Indonesia (corvettes, mine countermeasure vessels, amphibious craft and possibly submarines), Malaysia (two British-built frigates), Taiwan (submarines and French frigate hulls), and Thailand (two more Chinese frigates, perhaps some coastal submarines and one, possibly two, helicopter carriers).[78] In addition, the IISS wrote:[79] the PRC is acquiring an aircraft carrier from the Russian Pacific Fleet; the

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78 IISS, *The Military Balance, 1993-1994* (1993) p. 146.

79 *Ibid.*, pp. 148-149.

Indonesian Navy, over the next two years, will take delivery of the bulk of the remaining ships of the former East German Navy;[80] the Malaysian Navy took delivery of six more *Wasp* HAS-1 armed helicopters in 1993;[81] the Philippine Navy has increased its aviation inventory with three more BN-2A *Defender* maritime reconnaissance aircraft;[82] the Singaporean Navy has acquired a British *Sir Lancelot*-class LST;[83] the Taiwanese Navy has commissioned its first *Cheng Kung*-class (Taiwanese-built) GW frigate which carries a helicopter, five more ships in this class and two of a larger class are planned, and two ex-US *Knox*-class frigates have been purchased;[84] the Thai Navy has commissioned a second Chinese-built *Jianghu*-IV-class frigate and improved its maritime reconnaissance and ASW capability with the procurement of three P-3A *Orion* aircraft. Furthermore, the ASEAN states are slowly moving in the direction of increased military co-operation, with the PRC being the only possible target.[85] The situation may have deteriorated after Vietnam joined the ASEAN in July 1995, with the PRC becoming more isolated.[86]

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80 *Asian Defence Journal* (March 1991) p. 10.

81 About Malaysian arms purchase, see Da Cunha, "Major Asian Powers and the Development of the Singaporean and Malaysian Air Forces," 13 *Contemporary Southeast Asia* (1991) pp. 67-69; Vatikiotis, "Mix and Match: Russia and US Split Order for Combat Aircraft," *FEER* (8 July 1993) p. 13.

82 Also see *The Manila Chronicle* (10 April 1991) and (22 April 1991).

83 Da Cunha, *supra* note 81, pp. 61, 63, 64.

84 Hickey, "China's Threat to Taiwan," 5 *P. Rev.* (1992) pp. 254-255.

85 Gallagher, *supra* note 28.

86 *Reuters*, Hanoi, 31 March 1995.

Some littoral states responded in a more serious manner by occupying islands and developing their naval capacity to patrol newly claimed zones so as to exercise their rights over these zones or rights in the future. In November 1986, Malaysia decided to dispatch troops to two more atolls, Mariveles Reef and Dallas Reef. Another example, in April 1987, Vietnam also proceeded to occupy a new island, Barque Canada Reef.[87] These actions can be seen as a response to the PRC's military build-up. And more importantly, the occupation of the South China Sea islands by littoral states is a display of force rather than its use.[88]

Under such circumstances, a military build-up could be the most dangerous factor which deteriorates the regional security in this 'flash point' area. In fact, a military build-up is only the tip of the iceberg. The real core issue is that all the littoral states are competing for resources in the region. Consequently, military co-operation would not be achieved unless the issues of resource utilisation can be resolved first. The following two sub-sections discuss the issues of resource utilisation.

4.2. CO-OPERATION IN HYDROCARBON RESOURCES EXPLORATION

In a semi-enclosed sea like the South China Sea, whose width is less than 400 nm, an immediate implication of the 200 nm extended EEZ is that there will be no high seas

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87 *Straits Times* (16 April 1987) p. 36.

88 Leifer, "The Maritime Regime and Regional Security in East Asia," 4 *P. Rev.* (1991) p. 132.

in this region.[89] Under normal circumstances, they should have endeavoured to resolve the maritime zones issue through diplomatic or legal approaches. On the contrary, the possibility of exploitation of hydrocarbon resource is the main obstacle to construct a co-operation regime. In the light of dependence on petroleum, whether importing it or exporting it for economic development, some of the littoral states prefer to achieve sole access to this resource. In the case of the PRC, oil accounted for 27% of export in value in 1985, but only 5% in 1991.[90] In this respect, it is difficult to envisage that the relevant countries will withdraw from those occupied islands voluntarily, even though they are not sure whether hydrocarbon resources are exploitable in the continental shelf they claimed. Furthermore, this attitude makes maritime delimitation arduous, because delimitation concerns the issue of definition of sovereignty which highlights the sensitivity of the issue.

Take the disputed area between the PRC and Vietnam for instance, neither party would like to give up its claim or control on the disputed area.[91] Furthermore, each party has tried to co-operate with a third party to explore the hydrocarbon resources. When the Sino-foreign seismic survey agreements in the South China Sea

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89 Marr, "Southeast Asian Marine Fishery Resources and Fisheries," in MacAndrews and Sien, eds., *Southeast Asian Seas: Frontiers for Development* (1981) p. 79.

90 Chanda, *supra* note 64, p. 16.

91 Johnston and Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (1991) pp. 144-151; Valencia, "Vietnam's Maritime Disputes: Hydrocarbon Resource Potential and Possible Solutions," 16 *Energy* (1991) pp. 1174-1180

were announced in 1979, Vietnam protested the proposed surveys as "a brazen violation of the territorial integrity of Vietnam and its sovereignty over its natural resources". It further issued a warning to foreign oil companies involved that they must "bear the consequences" of their actions.[92]

A similar argument erupted when the US Crestone Energy Company signed an offshore contract with China National Offshore Oil Company that covered an area of 25,155 km² in the Vanguard Bank area (Wanan Tan in Chinese) on 8 May 1992. It is reported that China pledged to use its full naval force if necessary to protect Crestone's concession.[93] The Chinese leasing is believed to be a reaction to the fact that Vietnam has delineated all the offshore area it claims into offshore concession blocks. On 16 May 1992, the Vietnamese government strongly protested in a statement that "the agreement between the Chinese and US company has seriously violated Vietnam's sovereign rights over its continental shelf and exclusive economic zone." Therefore, the Vietnamese government "demands the Chinese side stop immediately the illegal exploration and exploitation arrangements with the Crestone

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92 Harrison, "Conflicting Offshore Boundary Claims," *China Business Review* (May-June 1983) pp. 51-53. Cited from Gao, *supra* note 33, p. 349.

93 Gao, *ibid.*; Kristof, "China Signs US Oil Deal for Disputed Waters," *New York Times* (18 June 1992) p. A8; Vatikiotis, "China Stirs the Pot," *FEER* (9 July 1992) pp. 14-15; also Tuan, "For a Peaceful Sea," (1992).

company in the area of Vietnam's continental shelf."[94] In response, it is reported that Vietnam had entered into a contract with a Norwegian company to conduct seismic work in the vicinity of the area of the Crestone concession.[95]

Following the relaxation of the US trade embargo on Vietnam in early 1993, the Vietnamese waters became one of the places that western oil companies showed interest in. It was reported that two tracts close to the Crestone concession soon may be leased to international oil companies.[96] The response from the PRC about Vietnam's actions was that the PRC sent a seismic survey vessel on 5 May 1993 into Vietnam's Block 5-2, which is under lease to British Petroleum and Norway's Statoil. The PRC explained that "the seismic operations conducted by the Chinese survey vessel in the waters off the Spratly Islands are normal scientific exploration activities."[97]

Obviously, any offshore hydrocarbon resource development activity by any party is considered as a provocation or an act of hostility towards other parties. Under

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94 "Statement of the Ministry of Foreign Affairs of the Socialist Republic of Vietnam on the Agreement between Chinese and US Oil Companies for the Exploration and Exploitation of Oil and Gas on the Continental Shelf of Vietnam," 16 May 1992. Cited from Gao, *supra* note 33. Also see Valencia, "The South China Sea: Potential Conflict and Cooperation," Paper presented at the Third Workshop on Managing Potential Conflicts in the South China Sea, Yogyakarta, Indonesia, 29 June-2 July 1992.

95 *Reuters*, Hanoi, 4 September 1992; "Hanoi's Quiet Oil Move," *FEER* (20 August 1992) p. 6.

96 Chanda, "Stampede for Oil: US Firms Rush to Explore Vietnamese Waters," *FEER* (25 February 1993) p. 48.

97 *People's Daily* (14 May 1993) p. 1.

such circumstances, it is still difficult for all parties to co-operate on the development of hydrocarbon resources.

4.3. FISHERY CO-OPERATION

Trawlers were introduced to the Southeast Asian countries in the 1960's. With their efficiency and higher production rate, trawlers became a popular fishing method. At the outset, there neither a fishing policy nor the concept of fishery resources management for these countries to limit the occurrence of fishing efforts. When fishing efforts were not under control, more and more fishermen tended to compete with each other for the same stocks in the same fishing grounds. Hence, this eventually led to overfishing in the South China Sea region.[98]

Each individual country in the South China Sea region had already become aware of the overfishing problem in their fishing zones. In the case of Malaysia, the Malaysian government had noticed that the stocks of both demersal and pelagic fish in the inshore fishing areas were overexploited, especially off the east coast of Peninsular Malaysia. This is especially serious in the inshore areas where the competition for the same fishery resources is intense.[99]

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98 Menasveta, "A Regional Approach to the Development of Living Aquatic Resources in the Southeast Asian Region," in Johnston, Gold, and Tangsubkul, eds., *International Symposium on the New Law of the Sea in Southeast Asia: Developmental Effects and Regional Approaches* (1983) p. 36. Also Christy, "The State of Food and Agriculture," (1981) p. 83.

99 Majid, "Controlling Fishing Effort: Malaysia's Experience and Problems" (1985) p. 319.

In the Philippine waters, especially in the inland and inshore marine fishing grounds, overfishing is also a serious problem. Catch rates have substantially declined owing to excessive fleet sizes and number of fishermen.[100]

In the case of Indonesia, the increasing number of fishermen has caused heavy fishing pressure on the living resources, especially in those areas where concentration of fishermen occurs such as in the north coast of Java and Malacca Straits. According to statistics, the fishery resources in these two areas have already been exploited beyond the level of maximum sustainable yield.[101]

With regard to Thailand's fisheries, the exploitation of fishery resources in the Gulf of Thailand has gone beyond the level of maximum sustainable yield. Many species, such as round scads, mackerels, and anchovy, within the 50-metre depth from the coast in the Gulf of Thailand have been seriously overexploited.[102]

In the Sixth Session of the Committee for the Development and Management of Fisheries in the South China Sea, the Secretariat of FAO reviewed the current status of resources and fisheries in the coastal waters of the South China Sea

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100 IPFC, *Exploitation and Management of Marine Fishery Resources in the Philippines*, IPFC/87/Symp/III/WP.4, IPFC Symposium on the Exploitation and Management on Marine Fishery Resources in Southeast Asia, Darwin, Australia, 16-19 February 1987, p. 2.

101 IPFC, *Indonesian Country Experience,* IPFC/87/Symp/III/WP.3, IPFC Symposium, *ibid.*, p. 2.

102 Hongskul, "The Allocation of Scads and Mackerels," in Christy, *Law of the Sea: Problems of Conflict and Management of Fisheries in Southeast Asia* (1978) p. 6; Menasveta, *supra* note 98, p. 38.

region:[103] (i) most of the demersal fish and shrimps/prawn stocks in the region had been fully exploited and partly overfished; (ii) the coastal pelagic fish stocks had been intensively exploited in many waters in the region but that ample room still existed for further intensification of fishing; and (iii) the cephalopod resources still remained under-utilised with the exception of the Thai waters in the Gulf of Thailand.

Another report by FAO/SEAFDEC also stated that most of the demersal fish stocks in nearshore waters has already been heavily exploited, while some offshore stocks still retained room for further intensified fishing. However, a large increase in the total catch could not be expected.[104]

In view of the geographical features of the South China Sea, it fits the definition of 'semi-enclosed sea' in Article 122 of the LOSC, which provides

> "[E]nclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Because the South China Sea is semi-enclosed, any change in the ecosystem of the semi-enclosed sea will have significant impact on the whole area. It is generally recognised that the living resources in the South China Sea area migrate

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103 IPFC, *Report of the Sixth Session of the Committee for the Development and Management of Fisheries in the South China Sea*, Manila, Philippines, 6-9 December 1988, p. 4.

104 Isa and Noordin, 'The Status of the Marine Fisheries in the South China Sea,' Paper presented at the First Working Group Meeting on Marine Scientific Research in the South China Sea, Manila, Philippines, 30 May - 3 June 1993, p. 6.

from one EEZ to another, particularly those highly migratory species, such as tuna and other shared stocks.<See Map 6> Each country may already have its own assessment of its living resources in its EEZ, assuming that the definition and delineation of each EEZ is clear. The problems are that many of those EEZ boundaries are not well defined or mutually agreed upon by the relevant parties. Likewise, there are various conflicting claims to islands which complicate and defer the determination of the EEZ boundaries. For this reason, many experts and scholars are convinced of the need to co-operate on the assessment of the living resources in the South China Sea area without regard to jurisdictional boundaries. The basis for this endeavour would be Article 123 of the LOSC regarding enclosed and semi-enclosed seas.[105] The LOSC has foreseen this problem, since in Article 123, it stipulates,

> States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organisation:
> (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
> (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> (d) to invite, as appropriate, other interested states or international organisations to co-operate with them in furtherance of the provisions of this article.

Therefore, all parties concerned should have been aware that fish is a migratory and exhaustible resource so that rational use of the South China Sea and the preservation

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105 Djalal, *Issue Paper for Technical Working Group on the Resources Assessment of the South China Sea Informal Workshop* (1993) pp. 1-2.

of its marine environment are important to all parties. Thus co-operation among nations in the region is essential. In order to avoid overfishing or depletion of resources, conservation measures have to be taken. Such measures are not possible without regional co-operation and require close co-ordination by the countries concerned. This is especially true in a semi-enclosed sea.[106]

Indeed, a semi-enclosed sea concept could conceivably provide the catalyst to promote co-operation and co-ordination of the management of resources in the South China Sea.[107] Under such circumstances, for all the littoral states to make the boundary delimitation issue the first priority seems unwise. Rather, concentrating upon their common interests will be an essential motivation to solve the issues rationally.

Therefore, it makes sense in such a situation to view the resolution of conflicts in this region from a co-operational viewpoint in order to satisfy the mutual needs and interests. After examining several possible means of co-operation, fishery co-operation is the most feasible and the most urgent course of action for the littoral states. This is because the fishery resources should be properly exploited to avoid economic waste or over-exploitation. In fact, the relevant governments and quite a

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[106] Some scholars suggest that this co-operation is best carried out within the framework of existing regional mechanisms. See Menasveta, *supra* note 98, p. 44. This will be discussed later, see *infra* Sub-Section 5.2.

[107] Cordner, "The Spratly Islands Dispute and the Law of the Sea," 25 *ODIL* (1994) p. 71.

few scholars have been aware of the importance of co-operation. Nonetheless, sovereignty conflicts have delayed all forms of co-operation.

Accordingly, co-operation in the utilisation of fishery resources is a feasible and practical way to start a regional co-operation regime, because it sidesteps the issue of sovereignty and focuses upon common interests, namely the utilisation of living resources. In the meantime, it can also overcome the delay in resources utilisation. This delay is caused by the long-term negotiation about delimitation of continental shelf, which relates to hydrocarbon resources. Additionally, fishery resources management is more important to prevent over-exploitation or overfishing.[108] Therefore fishery resources management may be a touchstone of the littoral states' sincerity, or it can be treated as a confidence-building method, for further co-operation in other fields or even solving the issues of delimitation in the future.

Without affecting the jurisdictional boundary as laid down in the LOSC, it is certainly possible to have regional joint fishery management in the South China Sea as the starting point for further co-operation. If all states in this region treat co-operation as the key step to mutual benefit, then the future for such regional co-operation mechanism will be positive.

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108 LOSC, Articles 61 and 62.

5. FISHERY CO-OPERATION IN THE SOUTH CHINA SEA

In a semi-enclosed sea like the South China Sea, there are numerous areas for co-operation between the littoral states to proceed. However, under the situation of lacking of confidence between them, it is difficult for them to start any co-operation. The author highlights several possible co-operations and examines their feasibility. From the discussion above, fishery co-operation is the most feasible one. Fishery co-operation can also serve as a starting point whose effect can spill over into other areas.

5.1. LIST OF WORKS IN A FISHERY CO-OPERATION SCHEME

From the discussion above, it is obvious that even though some fishery resources of the South China Sea are still under-exploited, most are heavily exploited. Therefore, fisheries development should be accompanied by a rational resource management mechanism. Up to the present, however, there has been no single resource management which is efficient for the whole area. Even within the zones of each coastal state's jurisdiction, a rational resource management seems to be lacking. One of the reasons for this is the problem of overlapping claims among the coastal states and the other reason is that each coastal state does not have sufficient stock assessment data available to support a rational resource management.[109]

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[109] Dwiponggo, *Project Proposal on Regional Fisheries Stock Assessment in the South China Sea* (1993) pp. 1-2.

In view of the situation of living resources in the South China Sea, the activities of management and conservation of fishery resources can be categorised as follows:

A. Defining and minimising disputed areas.[110] The first task for the states concerned might be to define and minimise the disputed area. Then, a joint committee could be established to manage the issues of fishing vessels, either from the relevant states or other states, operating in the disputed area.

B. Definition and determination of stocks and allowable catch of living resources in the region. According to tagging studies, changes in hooking-rates, and size of catch, bluefin tuna, yellowfin tuna, skipjack tuna, and mackerels are the highly migratory species in South China Sea region.[111] Because some of their migrating routes are through two or more countries, they are also shared stocks. Therefore, in order to get the maximum benefit from managing, it is necessary to categorise those shared species into:[112]

> (A) Joint stocks which live partly within South China Sea waters and partly within the 200 nm fisheries zone of a country which is not within South China Sea region;

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[110] Valencia, "Southeast Asian Seas: National Marine Interests, Transnational Issues, and Marine Regionalism," in MacAndrews and Sien, eds., *supra* note 89, p. 341.

[111] Morgan and Valencia, eds., *Atlas for Marine Policy in Southeast Asian Seas* (1983) p. 58. Cf. *supra* Chapter 4, Sub-Section 2.3.

[112] Holden, "Management of Fisheries Resources: The Experience of the European Economic Community," in OECD, *Experiences in the Management of National Fishing Zones* (1984) pp. 114-116.

(B) Autonomous stocks which live entirely within South China Sea waters and the whole littoral states can manage as they wish.

Then a further stock analysis can be performed.

C. Data collection and surveillance. The required information or data for fisheries management may include the following:[113]

(A) Biological information: such as status of stocks, trends in catches per unit of fishing effort;

(B) Technical information: such as numbers and kinds of fishing vessels and gear;

(C) Economic information: such as trends in fish prices; incomes to fishermen;

(D) Social information: such as trends in numbers of fishermen, mobility into and out of fisheries;

D. Determination of maintaining or restoring populations of harvested species at levels which can produce the maximum sustainable yield. This concerns the limitation of the amount of fishing efforts by setting total allowable catches (TAC), the limitation of access, the regulation of the methods, and technical aspects of fishing. Minimising mesh size is the case.[114]

E. Allocating quotas among littoral states. Allocating quotas is important because:[115]

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[113] FAO, "Information Needed for Management," Paper presented at the Symposium on the Exploitation and Management of Marine Fishery Resources in Southeast Asia held in conjunction with the Twenty-second Session of the Indo-Pacific Fishery Commission, Darwin, Australia, 16-26 February 1987, p. 495. Also, see Report of the First Working Group Meeting on Marine Scientific Research in the South China Sea, Manila, Philippines, 30 May-3 June 1993, Conclusion Point 4.

[114] Holden, *supra* note 112, p. 114.

[115] *Ibid.*, p. 116.

(A) Effective management is impossible if the TAC is not divided into quotas, because the fishing vessels of each state would otherwise compete each other in order to maximise their share of the TAC before it is exhausted, the result would lead to the depletion of the resources;

(B) Littoral states can plan their fishing vessels development, marketing, etc., if they have guaranteed shares of the TACs.

F. Regional/extra-regional joint ventures involving technology transfers and development.[116] Joint ventures have become increasingly important to fishery management, because it is a good approach to upgrade the host country's fishing industry through personnel training and technology transfers.

G. Harmonising or standardising legislations. For fishery management, standardised laws might be established for the licensing of foreign fishing vessels for access to the South China Sea waters. Distant-water fishing nations of the region could be given privileged access. In a semi-enclosed sea, it is important to have laws harmonised so that a legislation vacuum can be avoided.[117]

H. All relevant parties should be invited. This is the spirit of co-operation in the semi-enclosed sea. Although it can be argued that Taiwan is not a state, Taiwan is

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116 Valencia, *supra* note 110, p. 341.

117 Kent, "Harmonizing Extended Zone Legislation in Southeast Asia," 13 *ODIL* (1983) pp. 247-268.

nevertheless a powerful and able party in the South China Sea.[118] Without its participation, any co-operation would be imperfect.[119]

5.2. PRESENT MECHANISMS FOR CO-OPERATION

Several regional organisations exist among the South China Sea states, which reflects the general willingness to resolve mutual problems through co-operation. They are:

A. The Indo-Pacific Fisheries Council (IPFC) of the FAO is a permanent treaty-based advisory body, established in 1948, comprising nineteen member states including Vietnam, Malaysia, Thailand, Indonesia, and Philippine. Its headquarters is in Bangkok.

The IPFC's original objectives were: (1) to identify fisheries problems in the Indo-Pacific area and to seek solutions oriented towards improved nutritional standards by encouraging, co-ordinating, and where appropriate undertaking research; (2) to exchange and disseminate information; and (3) to encourage and organise training courses on subjects related to fisheries.[120]

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[118] According to the UN document, Taiwan is one of the six largest distant water fishing states which took almost 90% of the total non-local catch. See FAO, *The State of Food and Agriculture 1992*, FAO Agriculture Series, No. 25, p. 143.

[119] A similar situation happened in the South Pacific Wellington Convention for driftnet fishing, see *infra* Chapter 8, Section 1. Also, Chapter 2, notes 100-107.

[120] Carroz, "Institutional and Financial Aspects of Time Management in the IPFC and IOFC Areas," No. TC/79/10 in Tuna Consultation Meeting, Manila, the Philippines, 26-30 June 1979.

B. The UNDP/FAO South China Sea Fisheries Development and Co-ordinating Programme (South China Sea Programme, or SCSP) is a fixed-term executive project which includes the development of pelagic resources. SCSP was established in 1974 by the IPFC to formulate national and regional programmes for the South China Sea. Its headquarters is in Manila. The Philippines, Malaysia, Thailand, Singapore, and Brunei are the member states.[121] The principal objectives of the SCSP are: (1) to stimulate fish production in the region; (2) to encourage regional stock management policies; (3) to facilitate the establishment of a suitable regional co-ordinating mechanism to ensure the most efficient use of limited national and international funds available for the development of fisheries, particularly those of coastal and high seas; and (4) to provide a focal point for fishery development, to stimulate investment in fisheries and to introduce management systems and methods to increase protein supplies required to meet national objectives.[122]

C. The Southeast Asia Fisheries Development Centre (SEAFDEC). An inter-governmental body comprising Japan, Malaysia, the Philippines, Singapore, Vietnam, and Thailand sponsors a fishermen's training centre in Thailand, a research/training facility in Singapore, and an aquaculture research and training centre in the Philippines.[123] It was designed as an autonomous regional technical

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121 Marr, *Fishery and Resource Management in Southeast Asia* (1976) p. 52; SCSP, *The South China Sea Fisheries: A Proposal for Accelerated Development*, SCS/Dev./73/1, 1973, p. 102.

122 SCSP, *ibid.*, p. 104.

123 Marr, *supra* note 121, p. 53.

body to promote fisheries development including small-scale fisheries in the Southeast Asian region.[124]

D. The International Centre for Living Aquatic Resources Management (ICLARM). A Rockefeller-initiated scientific centre created to carry out research and stimulate discussion and the flow of information on fisheries and other living aquatic resources relevant to meet the nutritive, economic, and social needs in economically developing countries.[125] ICLARM is committed to co-operating with other institutions. ICLARM sees its ultimate success as depending to "a considerable extent on the organisation's ability to establish good lines of communication with governments in the region ... In all of its activities, ... ICLARM should remain open and responsible to locally expressed needs in order to learn how it can best serve in the development and management of aquatic resources."[126]

As far as these four organisations' objectives are concerned, their functions should have covered the need for regional fishery management. However, in practice, none of them, either taken alone or collectively, is actually in a position to serve as a base for effective fisheries management in the South China Sea region both because of their limited membership, and because the areas covered are either too broad or

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[124] IPFC, *Proceedings of 19th Session* (1980) Section III. Cited from Saisunthorn, *Fisheries of the ASEAN States: Transition in the 200-Mile EEZ Regime* (1988) p. 305.

[125] ICLARM, *Report of the First Meeting of the ICLARM, Program Advisory Committee* (1977) p. 18; ICLARM, *ICLARM's Strategy for International Research on Living Aquatic Resources Management* (1992) p. 9.

[126] MacLean, ed., *ICLARM Report*, No. 1 (1977) p. 1.

too narrow, and lack of authority over the living resources within the 200-mile EEZ now subject to the coastal state's sovereign rights.[127] Take the IPFC for instance. According to FAO, the IPFC's boundary extends from the vicinity of 150° west longitude to about 60° east longitude. This would extend the area from east of the Hawaiian Islands to the east-central Indian Ocean.[128] On the other hand, another study points out that the Indo-Pacific area extends from somewhere about Easter Island, i.e. 109° east longitude, in the east to the African east coast in the west, and from the Asiatic mainland in the north to points in New Zealand, Australia, and Africa somewhere slightly south of the Tropic of Capricorn.[129] Therefore, the IPFC area overlaps considerably the area of competence of another FAO regional fisheries body, the Indian Ocean Fishery Commission.[130] In order to avoid the overlapping competence of these organisations, a suggestion was made to redefine the area of the IPFC roughly between 30° north latitude to 50° south latitude, and between 100° east longitude and 130° west longitude. This new defined area will include the western central Pacific and the chain of archipelagos stretching into central and south Pacific. Reconstructed in this concept, the area involves three different subregions: the

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127 Alexander, *Marine Regionalism in the Southeast Asian Seas* (1982) p. 46.

128 *Ibid.*

129 Goncalves, *Analysis of the Concept of 'Region' in the Informal Composite Negotiating Text* (1978).

130 Alexander, *supra* note 127, pp. 46-47.

Andaman-Malacca area, the South China Sea, and the Trust Territory of the Pacific Islands.[131]

Membership is another constraint to the function of regional organisations. Take SEAFDEC for instance, although it was designed as an autonomous regional technical organisation to promote fisheries development, its membership lacks some of the important fishing states, such as China, Taiwan, and Vietnam. Obviously, without the participation of these states, its ability to co-ordinate fisheries activities in the Southeast Asian Seas area would be almost non-existent.[132]

6. OBSERVATIONS

The establishment of the EEZ/EFZ offers all states an excellent opportunity to access resources within the areas adjacent to their coasts. In other words, changing the existing situation in which the great powers manage the seas, to a situation in which an important share may go to developing states. The EEZ/EFZ will not make all states equal, but it would allow developing states to gain control over whatever resources they might have within the areas adjacent to their coasts that were previously subject to the freedom of fishing.[133] Therefore, the EEZ/EFZ is a

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131 Miles, "An Assessment of the Impact of Proposed Changes in the Law of the Sea on Regional Fisheries Commissions," in *FAO Technical Assistance Programmes in Fisheries, and on the FAO Committee on Fisheries and Department of Fisheries*, COFI/C/4776/INF.3; Saisunthorn, *supra* note 124, p. 298.

132 Alexander, s*upra* note 127, p. 51.

133 Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987) p. 23.

reflection of the socio-economic relationship existing between the coastal state and its offshore areas. The insertion of 'economic' in the concept's name, the contents and substance of its regime, and the retention of the contiguous zone confirm the EEZ's economic function.[134]

Nonetheless, following the extension of jurisdiction and of maritime areas by coastal states, overlapping claims are an inevitable consequence, although their target is the resources within. The pursuit of national interests is very easy to convert to a dispute of sovereignty. As a result, such development would lead to complicating the dispute and delaying the final resolution. In view of this, it is necessary to turn back to the original intention of the EEZ, which is resources utilisation.

Under these circumstances, the design of provisional arrangements provides an alternative. In dealing with the problem of the boundaries, delimitation is the ultimate goal. However, before this can be achieved, exploration, exploitation, conservation, and management of the resources within the disputed area still can occur. And in the complicated case concerning the utilisation of resources, a functional solution is needed.

From the discussion on provisional arrangements, it is clear that all parties concerned should proceed in good faith. This principle applies not only to the actual

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134 Attard, *The Exclusive Economic Zone in International Law* (1987) p. 264.

performance of legal obligations properly undertaken but also to any other aspect of legal relations such as the earliest stages of negotiations.[135]

When provisional arrangements are formalised, they are almost without exception predicated on compromise provisions which provide that the arrangements entered into are without prejudice to the position of the parties in the future negotiations or adjudications concerning the legal nature of the dispute.

The concept of provisional arrangements also can be applied in the South China Sea region. In other words, the littoral states of the South China Sea should, on the basis of provisional arrangements and freezing claims, commence functional co-operations. The discussion in Sections 3 and 4 indicates that fishery co-operation, within others such as military co-operation and co-operation in hydrocarbon resources exploration, could be the basic and best choice to start. However, according to the unsuccessful experience of the present regional organisations, it should be borne in mind that all the parties concerned should be included in the co-operation mechanism, otherwise the new mechanism would fall into the same inefficient result.[136]

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[135] Mosler, "The International Society as a Legal Community," 140 *Hague Recueil* (1974-IV) p. 145; also 1969 Vienna Convention on the Law of Treaties, Articles 18 and 26.

[136] Cf. Mark Valencia once drafted a 'Spratly Treaty', which was based on international co-operative exploration, development and management of the living and non-living resources of the disputed area. However, this draft 'Treaty' fails to include Taiwan in it. See Valencia, "Spratly Solution Still at Sea," 6 *P. Rev.* (1993) Appendix 1, p. 164. In a latter research report, Valencia corrects this defect. See Valencia, Van Dyke, and Ludwig, "The South China Sea: Approaches and Interim Solution," (26 April 1995, mimeo.)

PART III.

THE IMPACT OF NON-RECOGNITION ON TAIWAN

Part Three is going to analyse three impacts of non-recognition on Taiwan. This discussion leads to the fact that Taiwan is capable of negotiating with other states although it is not recognised as a state and is capable of being a party to regional co-operation.

Part Three includes three chapters. Chapter 6 inspects the origins of statelessness of vessels in international law. Chapter 7 examines the situation that Taiwan is unable to officially participate in international conferences, mainly because it is not a member of the UN. In view of this, the focus of this chapter is on Taiwan's applying for membership in the UN. Finally, Chapter 8 analyses, with the illustration of two cases, those situations that Taiwan are unable to conclude agreements with other states. All three of these chapters suggest that international law guides how to solve international conflicts, but political will and wisdom decide when the conflicts should be solved.

CHAPTER SIX

STATELESSNESS

In international law, a fishing vessel without an effective nationality is not allowed to continue its operation and is without any diplomatic protection. To maintain public order on the high seas, the right to navigate should be restricted to those ships with effective nationality. As the International Law Commission pointed:[1]

> The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State.

As explained in Chapter 3,[2] three conditions make a vessel stateless, namely (A) When a vessel sails under two or more different flags and uses them according to convenience; (B) When a vessel has been deprived of the use of a flag by a country which the vessel claims as its flag or the vessels claimed state of nationality denies that such is the case; and (C) When the state of the vessel is not recognised by the questioning state.

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1 *YILC 1956*, Vol. II, p. 279.

2 See Chapter 3, Sub-Section 5.1.

Condition (C), which had already been discussed in Chapter 3, could apply to Taiwan's situation. Nonetheless, there has never been a case in which Taiwanese vessels have been rejected by port states because they do not recognise Taiwan.[3] In this chapter, we are going to discuss other relevant conditions which could make a vessel stateless.

1. CONDITIONS OF BEING STATELESS VESSELS

First of all, a vessel has one and only one nationality thus placing it under one jurisdiction. This condition is concerned with the responsibility of the flag state so that a vessel cannot avoid jurisdiction from any other state. In 1956, the International Law Commission had taken the view that the practice of sailing under the flags of two or more states, using them according to convenience, might give rise to abuse and was a 'practice which cannot be tolerated'.[4] An essential element in the public order of the oceans is that ships enjoying freedom of navigation should be subject exclusively to the jurisdiction of one flag state. They are then entitled to its protection and required to comply with the shipping legislation through which the flag state gives effect to rules of international law governing such matters as safety and protection of the environment.[5] O'Connell gives his opinion that a ship without nationality is a ship

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3 An interview with a staff member of the Overseas Fisheries Development Council of the Republic of China on 15 February 1996.

4 "Report of the International Law Commission to the General Assembly," *YILC 1956*, Vol. II., p. 280.

5 Brown, *The International Law of the Sea*, Vol. I (1994) p. 291.

without diplomatic protection.[6] Obviously, flying only one flag is a precondition for enjoying protection under international law. Otherwise, this vessel loses its nationality and become stateless.[7]

Under this scenario, the vessel cannot enjoy any protection on the high seas. This is provided in the 1958 Geneva Convention on the High Seas, Article 6 and the LOSC, Article 92. In practice, *Naim Molvan* v. *A. G. for Palestine* case reveals this principle.[8] The ship Asya was sighted by a British destroyer 100 miles south-west of Jaffa, flying no flag. When interrogated it hoisted the Turkish flag, but on arrival of a boarding party this was hauled down and a Zionist flag hoisted. The Privy Council rejected the proposition that freedom of the seas gave the Asya the right to sail, because[9]

> the freedom of the open sea, whatever those words connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations.

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6 O'Connell, *The International Law of the Sea*, Vol. II (1984) p. 755. Also, Jennings and Watts, eds., *Oppenheim's International Law* (1992) p. 731.

7 LOSC, Article 92(2) provides:

> A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

8 [1948] AC 369. Cf. *United States* v. *Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982).

9 *Ibid.*

A state has the right to decide the conditions of granting nationality to a ship, as Article 91 of LOSC provides[10]

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Because conditions for granting nationality to ships are left to each nation, this leads to the issue of 'flag of convenience'. Flag of convenience indicates the states whose shipping policies have three properties in common: they permit registration of ships which actually belong to foreigners and which are actually operated by foreigners staying abroad; they levy exceptionally low taxes on the shipping business; as compared with the traditional maritime countries, and they allow the operator a great measure of freedom to arrange his affairs as he thinks fit. The flags are thus primarily convenient for operators.[11] The leading 'flag of convenience' states are Liberia and Panama, owing to their large registered tonnage which are larger than some leading shipping states.[12]

Another issue related to flag of convenience is the 'genuine link' between the ship and the country that this ship claims nationality to. The concept of 'genuine link' is commonly accepted by international practice. This can be seen from the *Nottebohm*

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10 Cf. 1958 Geneva Convention on the High Seas, Article 5.

11 Meyers, *The Nationality of Ships* (1967) p. 57, note 1.

12 Annex III of the 1986 UN Convention on Conditions for Registration of Ships, *Merchant Fleets of the World Ships of 500 GRT and Above as at 1 July 1985*, 26 *ILM* (1987) p. 1246.

case,[13] the Geneva Convention on the High Seas,[14] and the LOSC.[15] In the *Nottebohm* case, 'genuine link' was the sole evidence used to identify the relation between Nottebohm and Liechtenstein. This concept was expanded to other fields, such as the nationality of ships.

It is still arguable, however, that 'genuine link' is a vague concept. If we have a close comparison of the article in 1958 High Seas Convention with the one in the LOSC, it is clear that the text of Article 5, High Seas Convention is kept in the LOSC, except the wording 'in particular' onwards is omitted.[16] It seems that lack of a genuine link between the vessel and the registering-state does not necessarily create the situation of a stateless vessel.[17]

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13 *Nottebohm* Case, *I.C.J. Reports* (1955) p. 4. *Nottebohm* Case originally concerns the relationship between a person and a state, but this concept has been expanded to other fields, such as the nationality of a ship.

14 Geneva Convention on the High Seas, Article 5.

15 LOSC, Article 91.

16 1958 Geneva Convention on the High Seas, Article 5(1) stipulates:

> Each state shall fix the condition for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

In the LOSC, it provides:

> Each state shall fix the condition for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship.

17 McDorman, "Stateless Fishing Vessels, International Law and the High Seas Fisheries Conference," 25 *JMLC* (1994) p. 534; Jennings and Watts, eds., *supra* note 6, pp. 730-731.

In order to prove the nationality of the ship and verify the 'genuine link', some evidence should be presented to this effect.[18] Article 5 of the Geneva Convention on the High Seas stipulates,

> 1. Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
> 2. Each state shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Similarly, LOSC Article 91 reads as follows:

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

According to LOSC Article 91(2), "Every State shall issue to ships to which it has granted the right to fly its flag documents[19] to that effect." Therefore, those documents that the flag state issues to ships are important proof of genuine link. In the

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18 Cf. During the Armillo naval patrols of the Gulf during the war between Iran and Iraq, there was a question about the 'reflagging' of certain Kuwait merchant vessels by giving them the right to US flags. A request for similar action by the UK was apparently also made by Kuwait. There was some debate whether this was in accordance with the genuine link. UKMIL, 58 *BYIL* (1987) pp. 613-614.

19 There is no explicit regulation on what kind of document is necessary in international law, but is instead left to the different states' discretion. However, the following are the usual documents: 1. Certificate of Registry; 2. The Muster Roll; 3. The Logbook; 4. The Manifest of Cargo; 5. The Bills of Lading; and 6. The Charter Party. See Jennings and Watts, *supra* note 6, p. 734.

1986 UN Convention on Conditions for Registration of Ships,[20] the elements of a genuine link were provided, but this Convention has not entered into force yet.[21] According to the UN Convention on the Conditions for Registration of Ships, two criteria, ownership and manning, were stipulated to strengthen the genuine link between a state and ships flying its flag. The ownership criterion is provided in Article 8 of the 1986 Convention, which requires the flag state to include in its shipping legislation 'appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation'. It is further regulated that '[T]hese laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag.' Obviously, there is no clear provision for the compulsory settlement of any dispute which might arise from differing interpretations of the requirement.[22]

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20 UN Convention on Conditions for Registration of Ships, 1986. Text reprinted in 26 *ILM* (1987) p. 1229.

21 Brown, *supra* note 5, pp. 289-291.

22 Brown, *ibid.*, p. 289. Article 8 of the UN Convention on Conditions for Registration of Ships, 1986 reads:

1. Subject to the provisions of article 7, the flag State shall provide in its laws and regulations for the ownership of ships flying its flag.
2. Subject to the provisions of article 7, in such laws and regulations the flag State shall include appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag.

'Manning of ships' is another criteria regulated in Article 9 of the 1986 Convention. Paragraph 1 starts out by requiring the state of registration to observe the 'principle' that a 'satisfactory part' of crew should be nationals or persons domiciled or lawfully in permanent residence in that state. However, not only is there no indication of what constitutes a 'satisfactory part' but the 'principle' is further weakened also by the provision of paragraphs 2 and 3. Pursuant to paragraph 2, in pursuing the 'satisfactory part' goal, the flag state may 'have regard to', *inter alia*, the availability of qualified seafarers within that state and the sound and economically viable operation of its ships. Moreover, that fact that, under paragraph 3, the principle laid down in paragraph 1 may be implemented on a ship, company or fleet basis, means that there is no guarantee whatsoever that the manning criterion will be met in relation to any particular vessel.[23]

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[23] Brown, *ibid.*, pp. 289-290. Paragraphs 1 to 3 of Article 8 of the 1986 UN Convention on Conditions for Registration of Ships. It reads:

> 1. Subject to the provisions of article 7, a State of registration, when implementing this Convention, shall observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State.
> 2. Subject to the provisions of article 7 and in pursuance of the goal set out in paragraph 1 of this paragraph, and in taking necessary measures to this end, the State of registration shall have regard to the following:
> (a) the availability of qualified seafarers within the State of registration,
> (b) multilateral or bilateral agreements or other types of arrangements valid and enforceable pursuant to the legislation of the State of registration,
> (c) the sound and economically viable operation of its ships.
> 3. The State of registration should implement the provision of paragraph 1 of this article on a ship, company of fleet basis.

Apart from those conditions we have discussed, another situation could result in a stateless vessel, that is a vessel which has been deprived of the use of a flag by a country which the vessel claims as its flag or the vessel's claimed state of nationality denies that such is the case. Some states employ loss of nationality as a sanction of their national law against unlawful conduct at sea. In such a case, cancellation of nationality may thus cause statelessness.[24] However, a state cannot relinquish its responsibilities in connection with a ship by the fact that it made the ship stateless after those responsibilities had arisen.[25]

2. PRACTICE

Exercise of enforcement measures over the stateless vessels is justified on the ground that the stateless vessel is not entitled to the protection of international law.[26] Having examined above the conditions for being a stateless vessel, in this section, we will examine if a Taiwanese fishing vessel would be treated as a stateless vessel. In line with the purpose of this research, the following discussion focuses on the condition resulting from non-recognition.

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24 Meyers, *supra* note 11, pp. 313-315.

25 LOSC, Articles 31 and 42(5).

26 *United States* v. *Alvarez-Mena*, 1985, 765 Fed. 2d. 1259, 1265. Tousley, "United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is It Legal?" 22 *Case W. Res. J. Int'l L.* (1990) p. 375.

In international practice, a stateless vessel is only of concern on the high seas, because within EEZ/EFZ and territorial sea the adjacent coastal state has unquestioned authority to deal with all vessels engaged in fishing activities.[27] According to T. L. McDorman,[28]

> It has been reported that high seas driftnetters originally from Taiwan are continuing to operate on the high seas. Taiwan has legislation making such activity illegal and has imposed "de-certification" for non-complying vessels. Hence, the vessels still driftnetting on the high seas ... are no longer respecting Taiwanese law and ... may be considered as stateless vessels.

One question arises from McDorman's wording: If a Taiwanese fishing vessel operating on the high seas is suspected of being involved in driftnetting, can another state treat it as a stateless vessel and visit and search it? The answer might be in the negative because it concerns legal procedure. Pursuant to Taiwanese law:[29]

> In the event of the violation of the regulations, (all Taiwanese driftnet fishing will be prohibited on the high seas from 1 January 1993) the vessel will be punished with the withdrawal of the fishing certificate, while the captain and other officers will be imposed the revoke of the professional certificates and a penalty of maximum six months in prison. [brackets added]

Therefore, the Taiwanese government does not abandon its jurisdiction if a Taiwanese fishing vessel is identified as driftnetting on the high seas. Moreover, any Taiwanese fishing vessel which violates Taiwan's driftnet fishery ban will be punished with de-

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27 See *supra* Chapter 2, Sections 2 and 3.

28 McDorman, *supra* note 17, p. 532.

29 *High Seas Pelagic Driftnet Fishery Policy and Enforcement Measures of the Republic of China,* COA Nung-Yu Tzu No. 1040971A, 18 December 1992. Text translated and reprinted in 11 *CYILA* (1991-1992) pp. 297-299.

certification. In other words, under 'de-certification', a Taiwanese fishing vessel could be treated as 'stateless' if it continues its driftnet fishing operations on the high seas, because it does not have legal document for its registry.[30] Thus, in the case of a Taiwanese fishing vessel suspected of involvement in driftnetting, statelessness only comes about as a result of the application of legal sanction. Hence, suspicion alone is not enough, and cannot justify the arrest of the Taiwanese vessels by a third state.

In practice, Taiwanese fishing vessels have never been treated as stateless vessels.[31] In the case of driftnet fisheries, visiting and searching a Taiwanese fishing vessel on the high seas still needs agreement between Taiwan and the questioning state. This can be illustrated by the following agreement signed by Taiwan and the US.

In order to ban driftnet fisheries in the North Pacific, the US, through AIT, and Taiwan, through CCNAA, reached a driftnet monitoring and enforcement agreement on 30 June 1989, which entered into force on 24 August 1989 through an exchange of notes.[32] Under the agreement, Taiwan agreed to the following:

1. The squid driftnet fishery is pushed further south from 40° north latitude to 36° north latitude.
2. At no cost to the US, Taiwan is to install automatic real-time vessel location devices (transmitter) on its driftnet vessels and transports. The installation should cover 10% of all vessels in 1989 and reach 100% coverage by 1990.
3. All harvest must be landed in Taiwan before transferred to other ports.

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30 *Supra* note 19.

31 *Supra* note 3.

32 Agreement between the Coordination Council for North American Affairs and the American Institute in Taiwan regarding the High Seas Fishing in the North Pacific Ocean. See US, 135 *Congressional Record* §9474-75 (2 August 1989). Cf. Chapter 3, note 134 and its accompanying text.

4. Taiwan is to introduce legislation to restrict its vessels from carrying both large- and small-meshed driftnet gear. All such nets are to be marked for identification.
5. Taiwan consents to US Coast Guard visiting and verifying of all driftnet vessels detected outside the approved fishing area. Vessels inside the approved area may also be boarded, if under suspected fishing violations.
6. Taiwan is to introduce high seas enforcement patrol (two vessels for 200 patrol days in 1989, three vessels for 310 days in 1990).
7. Deployment of one US scientific observer in 1989. In 1990, the observation programme will expand pending further consultation.

The signing of this Agreement provoked domestic arguments in Taiwan. The arguments centred on two points: restrictions on Taiwanese fishing operations and allowing the US Coast Guard to board and inspect Taiwanese fishing vessels on the high seas.

At-sea transfer is a common method of fishery operation. In order to promote a fishing vessel's efficiency in remote fishing grounds, transport vessels are sent to transfer the harvest for sell in other countries, thus permitting fishing vessels to continue operating on the high seas. The Agreement establishes strict restrictions on at-sea transfer and regulates that all harvest must be landed in Taiwan ports before transferring elsewhere. Obviously this raises the cost to the fishing company and interferes with foreign nationals' commercial activities.

The most contentious issue during the Taiwan-US negotiations was that of the Taiwanese government allowing its fishing vessels to be boarded and inspected by the US Coast Guard in the high seas area of the North Pacific Ocean. From the outset of the negotiations, Taiwanese officials claimed, "Fishing vessels on the high seas are extensions of a state's territory. Therefore, it is impossible to allow US boarding on our

vessels on the high seas."[33] But the result was not what the government claimed. This provision stirred up Taiwanese people's anti-American sentiment[34] and also their mistrust of government.[35]

Nonetheless, challenged by the US embargo on its fishery exports, the Taiwanese government had to conclude this Agreement. Statistics show that the US was the second largest market for Taiwanese fishery products export. Taiwan exported more than US$320 million worth of fishery products to the US, which constituted about 25% of its overall fishery export in 1988.[36] These figures showed that the US market is very important to the Taiwanese fishing industry. Taiwan had to compromise between domestic pressure and external relations.

In terms of inspecting Taiwanese fishing vessels, Taiwan consented to US enforcement authorities visiting Taiwanese squid driftnet vessels on the high seas for the purpose of verifying fishing violations under the following circumstances:[37]

> (a) Outside the Fishing Area Authorised by the Party Represented by CCNAA: personnel from the party represented by AIT may visit driftnet vessels of the territory represented by CCNAA wherever found if detected outside the authorised fishing area upon transmission of prior notification to CCNAA.

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33 Council of Agriculture press conference, Taipei, 10 July 1989.

34 American Institute in Taiwan, *Media Summary: 14 July-15 August,* Taipei, Taiwan (11 August 1989) p. 2.

35 Chou, "What Did the Government Achieve?" *China Times Weekly* (15 July 1989) p. 56.

36 *Fisheries Yearbook, Taiwan Area: 1988.*

37 *Supra* note 32, Article V.

(b) Inside the Fishing Area Authorised by the Party Represented by CCNAA: personnel from the party represented by AIT may visit driftnet vessels of the territory represented by CCNAA inside the authorised fishing area upon the notification to CCNAA:
   (1) Prohibited species are observed on board;
   (2) Transfer of catch is observed in progress where there is reason to believe that catch being transferred is of anadromous species;
   (3) Identification of the vessel is obscured in any way;
   (4) Transmitter is not operating;
   (5) Vessel is not on the list provided by CCNAA of registered driftnet vessel; or
   (6) Vessel is evading detection or fleeing.

This agreement expired on 31 December 1990. The two states met in Honolulu to discuss renewal of the 1989 Agreement on 19-22 March 1991. Under the terms of the renewed agreement, Taiwan would actively invite American scientific observers to board Taiwan's driftnet fishing vessels to collect information on the impact of driftnet fishing on the marine ecosystem. The US enforcement officials were required to present a request to the Taiwanese authorities to visit the Taiwanese fishing vessels on the high seas. Only after obtaining permission from the Taiwanese authorities, could the US enforcement officials, together with the Taiwanese enforcement agents, board the suspected vessel to verify whether fishing violations had occurred. Moreover, the evidence regarding fishing violations provided by the US would not be considered as valid proof unless confirmed by Taiwan's enforcement authorities.[38] Hence, permission from the Taiwanese government constituted the basic requirement.

On a completely different issue, as Taiwan is not recognised by most states, will Taiwanese fishing vessels be treated as stateless vessels when they are operating

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38 Song, "United States Ocean Policy: High Seas Driftnet Fisheries in the North Pacific Ocean," 11 *CYILA* (1991-92) pp. 114-115.

on the high seas? The answer to this question can be deduced from the following discussion.

During the period of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Poland questioned the use of the word 'entities' at the end of Article 1(3) of the Revised Negotiating Text[39] and said that the paragraph should reflect the reality that 'entities' must also include those fishing in EEZs. In response, the Conference Chairman pointed out that paragraph (3) is a particular reference to the status of China. Article 1 is written in this way to secure compliance and observation of the standards as set forth by this agreement.[40] In the final draft Agreement of the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,[41] Article 1(3) keeps the main spirit of what was mentioned in Revised Negotiating Text and provides: "This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas." It is clear that the 'fishing entities' here refers to Taiwan. Under this circumstance, it is understandable that Taiwanese fishing vessels should not be treated as stateless vessels. Furthermore, Taiwanese fishing vessels should be included in the global fishery resources management mechanism so that the compliance and observation of the UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish

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39 Revised Negotiating Text, UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. UN Doc. A/CONF.164/13/Rev.1, 30 March 1994.

40 *ENB*, at http://www.iisd.ca/linkages/vol07/0741014E.html. However, no document of the Conference makes it clear on what basis an entity can profit from the 1995 Agreement. It still needs international practice to build up explanations.

41 UN Doc. A/CONF.164/33, 3 August 1995.

Stocks can be secured. However, given political circumstances, i.e. recognition issue and the international status of Taiwan, Taiwan can be considered a 'fishing entity' but not a state.[42]

Under such a 'fishing entity' status, Taiwan should be included in the 1995 Agreement mechanism. According to the 1995 Agreement, an important designation is the function of subregional or regional fisheries management organisation or arrangement:

> Article 8
>
> 3. Where a subregional or regional fisheries management organisation or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to co-operate by becoming a member of such organisation or a participant in such arrangement, or by agreeing to apply the conservation and management measures established by such an organisation or arrangement ...
>
> 4. Only those States which are members of such an organisation or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organisation or arrangement, shall have access to the fishery resources to which those measures apply.

Nonetheless, it seems normal that Taiwan would be excluded from membership of a regional fishery organisation because of its international status. However, the 1995 Agreement envisages this concern. Firstly, Article 34 of the 1995 Agreement requires states "shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognised in this Agreement in a manner

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42 For this reason, at the final session of the Conference, China delegate states that '*Province of Taiwan* enjoys abundant fishing' to reiterate its position on 'One China Policy'. See *ENB*, at http://www.iisd.ca/linkages/vol07/0754027E.html.

which would not constitute an abuse of right." If, in a given region, a group of states tried to exclude another responsible state whose vessels had a history of fishing there or that had some other equitable claim to participate in the fishery, this state could well give rise to a claim under Article 34.[43]

Secondly, Article 8(3) of the 1995 Agreement, reflecting Articles 63(2) and 64 of the LOSC,[44] calls for regional organisations for straddling fish stocks and highly migratory fish stocks to accept as members all states with a legitimate stake in the fishery concerns:

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[43] Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks," 27 *ODIL* (1996) p. 139.

[44] Article 63(2):

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Article 64

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organisation and participate in its work.
2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

States having a real interest in the fisheries concerned may become members of such organisations or participants in such arrangements. The terms of participation of such organisations or arrangements shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

Therefore, all states having a legitimate stake in a fishery have the opportunity to develop the relevant conservation and management measures. This principle should apply to Taiwan.

3. OBSERVATIONS

From the discussion above, the possibilities for Taiwanese fishing vessels to be considered as stateless vessels on the high seas can be looked at from three aspects:

Firstly, a vessel is stateless when it has two or more flags/nationalities. No such situation has ever happened before.

Secondly, a Taiwanese vessel is stateless when its nationality is deprived or cancelled by the Taiwanese government if it violates Taiwan's municipal law, such as continuing driftnet operations on the high seas after 1 January 1993. Under such a circumstance, a vessel would lose its Taiwanese registry and become stateless.[45] However, no such case has ever happened. On the other hand, in the case when the US Coast Guard wants to visit and search Taiwanese fishing vessels on the suspicion that the latter are catching certain anadromous species or operating driftnetting outside of the agreed

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45 *Supra* note 29.

areas, the former still has to obtain permission from the latter. Moreover, such action is provided for in an agreement concluded between the two parties. Therefore, the whole visiting procedure will be implemented under international law but not under the hypothesis that the Taiwanese vessels are stateless.

Thirdly, a vessel is stateless when other states do not recognise it. It is true that most of the states do not recognise Taiwan, but this does not necessarily mean that the Taiwanese fishing vessels are stateless. In order to avoid any political implication and secure compliance and observation of the standards of the straddling and highly migratory stocks agreement, 'fishing entity' is subtly designed to imply Taiwan.

Therefore, the issue of whether the Taiwanese fishing vessel is stateless or not is basically the same as the issue of Taiwan's international status. They both carry highly political implications. International law and theories only can serve as a guideline. However, practice does not follow it.

CHAPTER SEVEN

INABILITY TO PARTICIPATE IN INTERNATIONAL ORGANISATIONS

Since the ROC withdrew from the UN in 1971, several important international or regional conferences have been held for regulating the order of activities on the sea.[1] Taiwan did not participate in these meetings, partly because it is not a member of the relative international organisation, such as the UN, partly because it is not recognised by most of the states. In terms of the participating states, take UNCLOS III for instance, Taiwan was not allowed to attend any session.[2] As a coastal state and one of the powerful distant-water fishing nations, Taiwan's voice should have been heard and thus this is a flaw for the international society. Therefore, being a member of the UN becomes a basic requirement to attend official international conferences. In this chapter, we shall use Taiwan's application for the membership in the UN as an

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1 These conferences include international and regional ones. In terms of international conference, there were UNCLOS III (from 1974 to 1982) and the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (from 1993 to 1995). As for regional conferences, the Wellington Conference on the Prohibition of Long Driftnets in the South Pacific (November 1989) is one example. For Wellington Conference, see *infra* Chapter 8, Section 1.

2 Appendix of the LOSC. Cf. Chapter 3, note 146.

example to identify the situation that Taiwan is unable to participate in international organisations which cause it absent in international conferences.

1. TAIWAN'S UN MEMBERSHIP BID

The ROC government and the Taiwanese people have never given up the hope of re-joining the UN since the withdrawal from the UN in 1971. To avoid being completely isolated from international society, Taiwan has continuously tried to re-join the UN since 1993.[3] First, the ROC President Lee Teng-Hui announced on 9 April 1993 that Taiwan would actively seek membership in the UN, and he hoped the international community would seriously consider Taiwan's bid.[4]

On 8 May, the ROC Ministry of Foreign Affairs released a position paper entitled 'The Membership of the Republic of China in the United Nations'.[5] In this paper, the ROC government delicately presented the divided situation between Taiwan and the PRC. It reads:

> The Republic of China insists upon its rightful international status prior to national reunification. Under circumstances that *would not hinder the future reunification of China*, the Republic of China should be represented in the United Nations, thereby allowing for appropriate and effective representation of the rights and interests of the 20.8 million Chinese people who live in the area under the control of the Republic of China.

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3 Klintworth, "Taiwan's United Nations Membership Bid," 7 *P. Rev.* (1994) p. 283.

4 *Taiwan Communiqué*, No. 59 (September 1993).

5 "The Membership of the Republic of China in the United Nations," *Gazette of the Ministry of Foreign Affairs*, No. 496, 8 May 1993. English translation in 11 *CYILA* (1991-1992) pp. 271-276.

...

The ROC's participation in the United Nations would be consistent with the principles of the universality of the United Nations' membership and of respect for the fundamental human rights and freedoms of the 20.8 million people living in the Taiwan area. Moreover, it would be conductive to the *final reunification of China*. [emphasis added]

Obviously, the ROC government understands that its most serious obstacle to membership comes from the PRC. In the interim, the ROC sticks to its 'One China Policy' whilst applying for membership.

On 6 August 1993, the seven Central American countries that recognised the ROC,[6] sent a letter to the UN Secretary-General, urging him to place Taiwan's membership in the UN on the agenda of the 48th Session of the UN General Assembly.[7] They mentioned that "consideration of the exceptional situation of the Republic of China in Taiwan in the international context, based on the principle of universality and in accordance with the established model of parallel representation of divided countries at the United Nations," the ROC should be accepted as a member.

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6 These countries are Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. They recognise the ROC as a state and they neither recognise the PRC nor have formal diplomatic relations with the PRC.

7 UN Doc. A/48/191, 9 August 1993. On 19 July 1994, twelve UN member states proposed another similar letter, see UN Doc. A/49/144. On 17 July 1996, another document, discussing the situation that people in Taiwan cannot participate UN activities, was filed by sixteen UN member states, see UN Doc. A/51/142.

On 11 August 1993, the Permanent Representative of the PRC to the UN sent a note to the UN, opposing the aforementioned proposed resolution by saying that Taiwan's attempt to return to the UN is 'actually trying to split China, obstruct and sabotage the great undertaking of China's reunification' and '[this] attempt has been and will continue to be resolutely opposed by the entire Chinese people, including people in Taiwan, and is, therefore, doomed to failure.'[8] The proposal was not placed on the agenda of the General Assembly's 48th Session in September 1993. It was discussed, however, by the 28-member committee which sets the agenda with three nations, that is, Guatemala, Grenada, and Nicaragua, speaking in favour. Opposing the request was a solid bloc comprised of Bangladesh, Benin, Egypt, India, Iran, Pakistan, the PRC, Russia, Slovakia, Sri Lanka, and Tanzania.[9]

It is understandable that the ROC cannot win its bid in one go. The problem is that the ROC was a charter member of the UN and one of the five permanent members of the Security Council.[10] Although the PRC government occupied most of the Chinese mainland and was recognised by most of the states, the ROC government in

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8 UN Doc. A/48/306, 11 August 1993. Chinese representative's opinion pulls back the same debating on the issue of 'One China Policy'. See Chapter 3, Section 3.

9 Klintworth, *supra* note 3, p. 283.

10 See Charter of the United Nations, Article 23(1). It provides that "the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council."

Taiwan continued to be recognised by other states.[11] Thus, unlike the recent case of the dissolution of the Soviet Union, the ROC did not in fact cease to exist.

The Soviet Union, consisting of fifteen republics, used to be one of the five permanent members of the UN Security Council. Following the failed *coup d'état* in Moscow in August 1991, the republics in turn proclaimed independence. On 21 December 1991, the republics, in the Alma-Ata, declared that the Soviet Union had ceased to exist as a subject of international law and that they would henceforth constitute the Commonwealth of Independent States.[12] In contrast, the ROC did not declare that it ceased to exist as a state. On the contrary, it continues to exercise every function as a state, including diplomatic and economic relations, with other states.

Furthermore, in the case of the Soviet Union, on 24 December 1991, a letter to the Secretary-General of the United Nations from the Permanent Representative of the USSR to the UN stated that:[13]

> [T]he membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organisations of the United Nations system, is being continued by the Russian Federation with the support of the countries of the Commonwealth of Independent States.

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11 For discussion on recognition by states, see Chapter 3, Sub-Section 3.3.

12 *Tass,* Moscow, 22 December 1991. About Russia succeeded the USSR's seat in the United Nations, see Chapter 3, note 71 and the accompanying text.

13 Appendix to UN Doc. 1991/RUSSIA, 24 December 1991. Cf. Simma, ed., *The Charter of the UN: A Commentary* (1994) p. 173.

The Russian Federation then succeeded to the UN membership of the Soviet Union without opposition, whereas it took twenty-two years to settle the issue of Chinese representation in the UN. Thus, it is necessary to examine the requirements for UN membership. This will be discussed in the following section.

2. CONDITIONS OF BEING A UN MEMBER

Pursuant to the UN Charter, the members of the UN consist of original members and members admitted in accordance with Articles 3 and 4 of the Charter.

> Article 3
> The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organisation at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.
>
> Article 4
> 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organisation, are able and willing to carry out these obligations .
> 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

The ROC is one of the original member states of the UN. However, according to General Assembly Resolution 2758 (XXVI), the Chinese representative seat was replaced by the PRC.[14] Theoretically, the ROC can apply to have its seat restored, but this would inevitably raise objections and induce pressure from the PRC. Therefore,

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14 Chapter 3, Sub-Section 3.2.

the alternative falls to applying for membership in accordance with Article 4 of the UN Charter.

According to Article 4(1) of the UN Charter, membership is open to "all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations." In the Advisory Opinion on *Conditions of Membership in the United Nations*,[15] the ICJ gave Article 4(1) a further interpretation that the five conditions for any new applicants would be (A) a state; (B) peace-loving; (C) accept the obligations of the Charter; (D) able to carry out these obligations; and (E) willing to do so.

Condition (A), namely statehood, had been discussed in the Sub-Section 4.1 of Chapter Three. The other conditions form a rather vague concept, as they are easily connected with political considerations. From 1946 until 1955, when the Cold War between the Soviet Union and the western powers was at its height, political wrangling prevented the admission of a large number of UN applicants. The reasons given by members of the Security Council were sometimes disguised in legal terms. For example, a state's independence was in doubt (Jordan, Ceylon), a state was not peace-loving or willing to carry out obligations under the Charter (Albania, Bulgaria, Hungary, Romania); or a state would be unable to carry out such obligations (Mongolia).[16]

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15 *ICJ Reports 1948*, p. 57.

16 Fenwick, *International Law*, 4th Edition (1965) pp. 207-208; Greig, *International Law*, 2nd Edition (1976) pp. 699-702.

Nonetheless, it is still worthy to see whether the ROC fulfils the other conditions. The ROC, despite not having been a member of the UN since 1971, has continued to support the activities and resolutions of the UN. Thus, on 6 August 1990, after the invasion of Kuwait by Iraq, the UN Security Council adopted Resolution 661 to impose economic sanctions against Iraq.[17] The ROC government soon issued an order to implement this resolution by suspending the issuance of export licenses to Iraq.[18]

On 30 May 1992, the UN Security Council adopted Resolution 757,[19] imposing economic sanctions on Yugoslavia (Serbia/Montenegro) for its intervention in the Republic of Bosnia and Herzegovina. On 16 November 1992 and 17 April 1993, the Security Council continued to adopt Resolutions 787[20] and 820,[21] to strengthen its economic sanctions against Yugoslavia. For this matter, on 10 June 1993, the ROC Ministry of Transportation and Communications issued an order prohibiting the entry of Yugoslavian ships to ports in the ROC.[22]

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17 S/RES/661 (6 August 1990).

18 Public Notice of Mao (79) Fa No. 21592 of the Bureau of Foreign Trade of the Ministry of Economic Affairs.

19 S/RES/757 (30 May 1992).

20 S/RES/787 (16 November 1992).

21 S/RES/820 (17 April 1993).

22 Letter of Chiao-Han (82) No. 016274 to the port authorities of Keelung, Taichung, Hualien, Kaohsiung, and Suao.

As for accepting and carrying out the obligations of the UN Charter, the ROC has long demonstrated its ability to do so. In 1990 it set up an International Disaster Relief Fund to provide emergency aid to many countries.[23] In addition, the ROC's International Economic Co-operation Development Fund (IECDF) offers low interest loans to support economic development in developing countries. By May 1995, IECDF had promised loans to developing countries totalling US$331.1 million, including those agreements already signed and those to be signed in the near future.[24] Thus, although the ROC has been excluded from participation in the UN and its specialised agencies, it has continued to support the UN's activities and goals.

3. OBSERVATIONS

Excluding Taiwan or the ROC from any international organisation is an inappropriate attitude and goes against protecting the fundamental rights of Taiwanese people. Article 55 of the UN Charter provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
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> ...
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

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23 Ministry of Foreign Affairs, ed., *Tui-wai kuan-hsi yu Wai-chiao hsing-cheng* (*External Relations and Foreign Affairs Administration*) (1992) pp. 320-326.

24 11 *The IECDF Newsletter* (July 1995) pp. 6-7.

Article 56 continues to stipulate that

> All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

Since the ROC fulfils the requirements of being a member of the UN, the continual denial of the fundamental rights of the people in Taiwan to be represented in the UN is an injustice treatment of those people.

CHAPTER EIGHT

INABILITY TO CONCLUDE AGREEMENTS

We shall look at the practical situation that Taiwan is unable to conclude agreements with other states, even on topics that concern its own interests. The first case illustrates this difficulty. However, the second case demonstrates that Taiwan is still capable of concluding agreements with its neighbouring state. The paradoxical point will be identified in the observation.

1. THE WELLINGTON CONVENTION

The Wellington Convention is an important convention in opposing driftnet operation in the world. It is not only a regional document, but it also has influence on the UN to recommend a global moratorium on all high seas driftnet fishing.[1] It is extraordinary to know that as a major driftnet fishing state, Taiwan was not invited to sign the Wellington Convention. However, Taiwan did try its best to comply with the requests from the South Pacific island states. Taiwan's interaction with these states is the main theme of this first section.

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1 See Chapter 2, Sub-Sections 5.1.A.(B) and 5.1.C.

The Wellington Convention was open for signature by the member states of the FFA and any Territory situated within the Convention Area.[2] Two protocols were also prepared to further the Convention's objectives. Protocol I is "open for signature by any State whose nationals or fishing vessels documented under its laws fish within the Convention Area or by any other State invited to sign by the Parties to the Convention."[3] Therefore, Protocol I is provided for any distant-water fishing nation, such as Japan, South Korea, or Taiwan, whose nationals or vessels fish within the Convention Area. Protocol II is "open for signature by any State the waters of which are contiguous with or adjacent to the Convention Area or by any other State invited to sign by the Parties to the Convention."[4] According to the Final Act[5] of the Wellington Convention, the words "adjacent to the Convention Area" in Article 7 of Protocol II relate to countries on or within the Pacific Rim. Presumably this includes Russia, Japan, North Korea, South Korea, China, Taiwan, Vietnam, Malaysia, Indonesia, the Philippines, Chile, Peru, Ecuador, Colombia, Panama, Costa Rica, Nicaragua, Honduras, El Salvador, Guatemala, Mexico, the US, and Canada.

Accordingly, under the provisions of Protocols I and II of the Wellington Convention, Taiwan should be eligible to sign the two Protocols. In fact, a South Pacific delegation had visited Taiwan to see if Taiwan would be willing to sign the

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2 Wellington Convention, Article 10(1), *supra* Chapter 2, note 100.

3 Protocol I of the Wellington Convention, *ibid.*, Article 7(1).

4 Protocol II of the Wellington Convention, *ibid.*, Article 7(1).

5 Final Act of the Wellington Convention, *ibid.*

protocols. Taiwan indicated that it would participate in negotiations towards a fisheries management regime, providing it could participate as the Republic of China.[6] However, due to problems of international recognition of Taiwan,[7] Taiwan can not join the Wellington Convention with its official title, the Republic of China. This is despite the Taiwanese delegation having attended the Conference as an official government representation. The Taiwanese representative's claim that it should be recognised as the ROC was rejected and they were denied access to the Conference.[8] To enable Taiwan to accept the Wellington Convention provisions, a mechanism was adopted whereby the Director of the FFA was to exchange letters with the Taiwan Deepsea Tuna Boat Owners and Exporters Association. The letter from the Director of the FFA invited the Association to "undertake to ban its members and prevent their fishing vessels from using driftnets within the Convention Area." A further letter from the Chairman of the Taiwan Deepsea Tuna Boat Owners and Exporters Association to the Director of the FFA simply accepted the proposal of the Director.[9]

Immediately after the Conference for Wellington Convention, the first consultation to consider a management regime for the South Pacific was held in

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6 Wright and Doulman, "Driftnet Fishing in the South Pacific: From Controversy to Management," 15 *Mar. Pol.* (1991) pp.-320-321.

7 Only four states, Nauru, Solomon Islands, Tonga, and Tuvalu, officially recognise ROC in the South Pacific region. For the ROC's recognition issues, see *supra* Chapter 3.

8 *New Scientist* (9 December 1989) p. 8. Cited from Hewison, "The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific," 25 *Case W. Res. J. Int'l L.* (1993) pp. 456-457.

9 *Ibid.*, p. 528.

Wellington, New Zealand in November 1989. A Taiwanese delegation had travelled to New Zealand, but it failed to participate in the consultations because of political difficulties associated with its international status.[10]

The second consultation was held in March 1990 in Honiara. Again, Taiwan did not attend because of political difficulties. Nonetheless, informal briefings on the consultations by the FFA helped to keep Taiwan abreast of discussions about the development of a management regime for South Pacific albacore tuna.[11]

Before the third consultation in October 1990 in New Caledonia, all the participants at the previous consultations reached consensus on a title for the ROC, Taiwan-China, which enabled Taiwan to participate in the New Caledonia consultation.[12]

This was a common sense solution to the problem, because Taiwan is one of parties in the conflict. With Taiwan's continued exclusion from the process, the probability of securing a lasting regime for the fishery would have been low.[13]

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10 Wright and Doulman, *supra* note 6, p. 323. Also, *Sydney Morning Herald* (28 November 1989) p. 4.

11 Wright and Doulman, *ibid.*, p. 323.

12 *Ibid.*, p. 324.

13 *Ibid.*

As regards Taiwan's reaction to the Wellington Convention and other actions taken by the South Pacific island states, Taiwan gave them all serious consideration. The reasons for this are twofold:

A. The South Pacific Ocean is an important fishing ground for the Taiwanese fishing industry. Since tuna is the main fishery resource in the South Pacific, the Taiwanese fisheries in this region are involved mainly in tuna fishing which can be divided into three sectors: Firstly, Tuna Longliner: until the end of 1988, almost all Taiwanese vessels were longliners targeting albacore.[14] Take the albacore fishery for instance. Since the 1970's, Taiwanese longliners have become one of the most important fisheries in the exploitation of South Pacific albacore.[15] Taiwanese South Pacific tuna longliner fisheries always shows a rather high percentage (over 70%) of albacore catch composition in their total catch.[16] According to South Pacific Commission statistics, the number of Taiwanese longliner vessels equalled 109 in 1987 and increased to 124 in 1988.[17] In addition, Taiwanese purse seine vessels started to operate in the south-western Pacific. Skipjack and yellowfin tuna are their target species.[18] The number of the Taiwanese purse seine grew from about 10 at the beginning of 1988 to 17 by the

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14 South Pacific Commission, *Report of the Second South Pacific Albacore Research Workshop,* Suva, Fiji, 14-16 June 1989, p. 4.

15 Wang, "Seasonal Changes of the Distribution of South Pacific Albacore Based on Taiwan's Tuna Longline Fisheries, 1971-1985," 20 *Acta Oceanographica Taiwanica* (1988) pp. 13-14.

16 *Ibid.*, p. 38.

17 South Pacific Commission, *supra* note 14, p. 12.

18 *Ibid.*, p. 4.

end of 1988, to 26 by 1989, and grew to over 30 by early 1990.[19] Therefore, the South Pacific fishing ground is important to Taiwanese fishing industry.

B. Owing to its isolated international status, the Taiwanese government has to take care of any possibility which could cause further isolation. Facing pressure that it abandon driftnet fisheries, the Taiwanese government had to take some measures to comply with the requests of the South Pacific countries.

2. THE AGREEMENT ON SEA LANE PASSAGE AND MEMORANDUM ON AGRICULTURE AND FISHERIES CO-OPERATION

From the above discussion, it is clear that the disputes between Taiwan and the Philippines began with problems of resource utilisation, especially fishery resources, and then developed into issues of delimitation of the overlapping EEZs. Thus, the essential aspects of the dispute concern economic factors, i.e. resource utilisation. The legal aspect; delimitation of maritime zone, becomes a secondary aspect. Unfortunately, political considerations have played a decisive role and because there are no official relations between Taiwan and the Philippines, the progress of resolution

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19 Narasaki, "Structure of DWFN's Purse Seiner Fleets and their Production Volumes," in Herr, ed., *The Forum Fisheries Agency: Achievements, Challenges and Prospects* (1990) p. 315.

has been retarded. Twenty-three years after the first fishery dispute,[20] the 'Agreement on Sea Lane Passage and Memorandum on Agriculture and Fisheries Co-operation', was concluded, the essence of which is its pragmatic and co-operative nature.

2.1. THE INITIATION

From March through April 1991, the Philippines detained several Taiwanese fishing vessels. The most serious incident happened on 27 April 1991, when the Philippine navy sunk a Taiwanese fishing vessel. According to the Philippine government's statement, the sinking resulted from the Taiwanese fishing vessels' illegal intrusion into the Philippine territorial sea. At the same time, another seven vessels were detained for illegally intruding into the Philippines' EEZ.[21]

These incidents provoked an angry response from Taiwan. The Taiwanese Premier, Hau Pei-Tsun, ordered the ROC Representative to the Philippines[22] to assert Taiwan's position that it hoped to initiate negotiations immediately.

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20 On 21 July 1968, a Taiwanese fishing vessel, the Lien-Chun-Tsai, was seized by the Philippines in the waters of the Bashi Channel and charged with 'illegal intrusion and fishing'. See *Gazette of the Legislative Yuan,* Vol. 68, No. 82, 13 October 1979, p. 67.

21 *Central Daily News* (28 April 1991) p. 2.

22 Despite no official relations, Taipei and Manila still maintain un-official relations under which two countries sending un-official representatives to each country and performing a certain level of official tasks, such as processing visa applications. See *supra* Chapter 3, note 101 and the accompanying text.

Both the ROC and the Philippine declarations on EEZ provide rules which refer to international law for the resolution of overlapping EEZ claims. In the ROC declaration, Paragraph 2(B) provides:

> Where the exclusive economic zone of the Republic of China extends over any part of the exclusive economic zones as proclaimed by other States, the boundaries shall be determined by agreement between the States concerned or in accordance with generally accepted principles of international law on delimitation.

On the Philippines side, according to its Presidential Decree No. 1599, Section 1,

> [W]here the outer limits of the zone as thus determined overlap the exclusive economic zone of an adjacent or neighbouring State, the common boundaries shall be determined by agreement with the State concerned or in accordance with pertinent generally recognised principles of international law on delimitation.[brackets added]

Besides, it was a good time to propose a negotiated settlement for a number of reasons as follows:

First, Taiwan plays an important role in the Philippine economy. Taiwan is the Philippines' second largest trading partner with a bilateral trading amount of US$1,047 million dollars in 1991. Taiwan was also the second largest foreign investor country in the Philippines at US$140 million dollars in 1991. The Philippines needs Taiwanese investment to alleviate its economic difficulties.[23]

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23 *Straits Times* (24 August 1991) p. 16. Also *Gazette of the Legislative Yuan*, Vol. 81, No. 15, 11 July 1991, pp. 12-46. Cf. Leong, "The Changing Political Economy of Taiwan - Southeast Asia Relations," 6 *P. Rev.* (1993) pp. 32-35.

Secondly, Taiwan had embarked on a Six-Year National Development Plan, which needs a large amount of labour. The Philippines is keen to export labour to Taiwan to resolve its serious unemployment problem.[24]

Thirdly, the eruption of the volcano Mount Pinatubo in 1991 increased the Philippine government's need for foreign capital and technical assistance to put its domestic economy on the road to recovery.

Fourthly, following a prolonged period of isolation from international society, Taiwan was eagerly seeking opportunities to re-enter the international arena. Maintaining good relations with the regional organisation, ASEAN,[25] has been important to Taiwan. Starting negotiations or concluding an agreement, if possible, could mark a victory and enable Taiwan to break out of its long-term diplomatic isolation.

Given this background, the Philippine government organised an internal ad hoc committee, the South China Fishery Dispute Settlement Committee, to negotiate with countries with which it had fishery disputes.[26] The Chairman of the Committee and also the Assistant Executive Secretary and Chief of Staff of the Philippine Presidential

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24 *Straits Times* (4 May 1991) p. 14.

25 Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, and Vietnam are the member states of ASEAN. None of them has diplomatic relations with Taiwan.

26 *Reuters*, Manila, 7 May 1991. 27 *Report of Sino-Philippine Fishery Negotiation*. (In Chinese text) A special report to Foreign Affairs Committee and Economics Committee of the Legislative Yuan by the Agricultural Council Chairman, Yu Yuh-Hsien, 11 July 1991, p. 3.

Office, Roberto R. V. Lucila, invited Taiwanese Agricultural Council Chairman, Yu Yuh-Hsien, to the Philippines to negotiate the disputes between the two countries.[27]

2.2. FIRST ROUND OF NEGOTIATIONS

The first round of negotiations took two days, 21 and 22 May 1991. The main issues were: (1) Designating sailing routes for Taiwanese fishing vessels exercising right of innocent passage in the Luzon Strait. Once such routes were designated, Taiwanese fishing vessels could safely exercise the right and, as a result, avoid arrest. (2) Joint development of the fishery resources in the area where the EEZs of the two countries overlap. A difficulty arose over this point, in that under the Philippine Constitution, fishing within the Philippine territorial sea is limited only to Filipino people.[28] This would limit the range of joint development, therefore considerations would be on the conservation methods as well as the exploitation of fishery resources. (3) Fishery co-operation. This concerns the ROC government encouraging its people to invest in the facilities and construction of the Philippine fishing ports, and a training programme for Philippine fishermen.

As this was their first formal contact and due to the limited time, both parties did not expect to reach any agreement, instead intending just to convey their positions

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28 The Philippine Constitution, Article XII, Section 2(2).

and exchange views on the above issues.[29] After the negotiations, both parties issued a joint statement:[30]

1. Both Parties agree to meet again on 4-7 July 1991 in Taipei;
2. Due to the lack of time, there is no any agreement reached between Parties, but both Parties had conveyed their positions on designating sailing routes for innocent passage in the Luzon Strait, joint development of the fishery resources in the area of overlapping EEZs, and fishery co-operation. And they agree that it takes time to draw up appropriate proposals which benefit both Parties;
3. Under the basis of reciprocity, both Parties emphasise that any Party's decision or proposal should satisfy the demands about the national security and economical benefits of both Parties;
4. If a justified and reasonable resolution can be reached, the ROC, in order to assist the Philippines to develop its fishing industry, will provide fishery assistance, training programs, fishing vessels to the Philippines, to encourage the ROC nationals to construct fishing ports in the Philippines, and to provide technical suggestions;
5. The Philippines agrees to seek resolutions, under the presumption that comply with the Philippine Constitution, about designating sailing routes for innocent passage in the Luzon Strait and provisional arrangements in the overlapping EEZs, so that both Parties can share the benefits.

As the Manila meeting was the first official contact between the Philippines and the ROC since termination of their diplomatic relations in 1975, a great deal of concern, especially coming from Taiwanese domestic pressure, surrounded the meeting. On the one hand, it was good for policy making, because the government's public policy-making process could be monitored by the public. On the other hand, this could put too much pressure on the Taiwanese delegates and push them into making wrong decisions. However, as it had been twenty-three years since the first

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29 *Report of Sino-Philippine Fishery Negotiation, supra* note 27, p. 5.

30 *Ibid.*, pp. 5-6.

fishery dispute occurred, too many influential factors were involved in this issue. At this stage, it would be practical if both Parties could exchange their opinions and understand their respective positions rather than attempting to resolve the issues in a two-day meeting.

2.3. SECOND ROUND OF NEGOTIATIONS

The second round of Sino-Philippine fishery negotiation was held in Taipei from 3 to 7 July 1991. After the talks, Taiwan and the Philippine delegates signed an inter-governmental agreement, 'Agreement on Sea Lane Passage and Memorandum on Agriculture and Fisheries Co-operation', on 7 July. This Agreement, the first one between them since Taiwan and the Philippines suspended diplomatic relations in 1975, was signed by Chiu Mao-Ying, Vice Chairman of the Agricultural Council, and Roberto R. V. Lucila, Assistant Executive Secretary of the Chief of Staff Office under the Philippine Presidential Office, on behalf of the two governments. The main themes of the Agreement are:[31]

1. The Philippines will designate two sea lanes in its territorial waters for innocent passage of the ROC fishing boats on their way to the south and southwest Pacific Ocean.<See Map 13> The ROC will require its fishing vessels to abide by the Philippine regulations about innocent passage, which includes:
   (A) proceed without delay;
   (B) not perform any fishing activities;
   (C) refrain from use of force of any kind, or any other acts in violation of the principles of international law embodied in the Charter of the United Nations;

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31 *Ibid.*, pp. 8-11.

(D) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by f*orce majeure* or by distress;
(E) comply with generally accepted international regulations, procedures and practices for safety at sea;
(F) not pollute the Sea Lanes;
(G) not carry out research or survey activities without the prior authorisation of both Governments; and
(H) stow the fishing gear of the vessels.

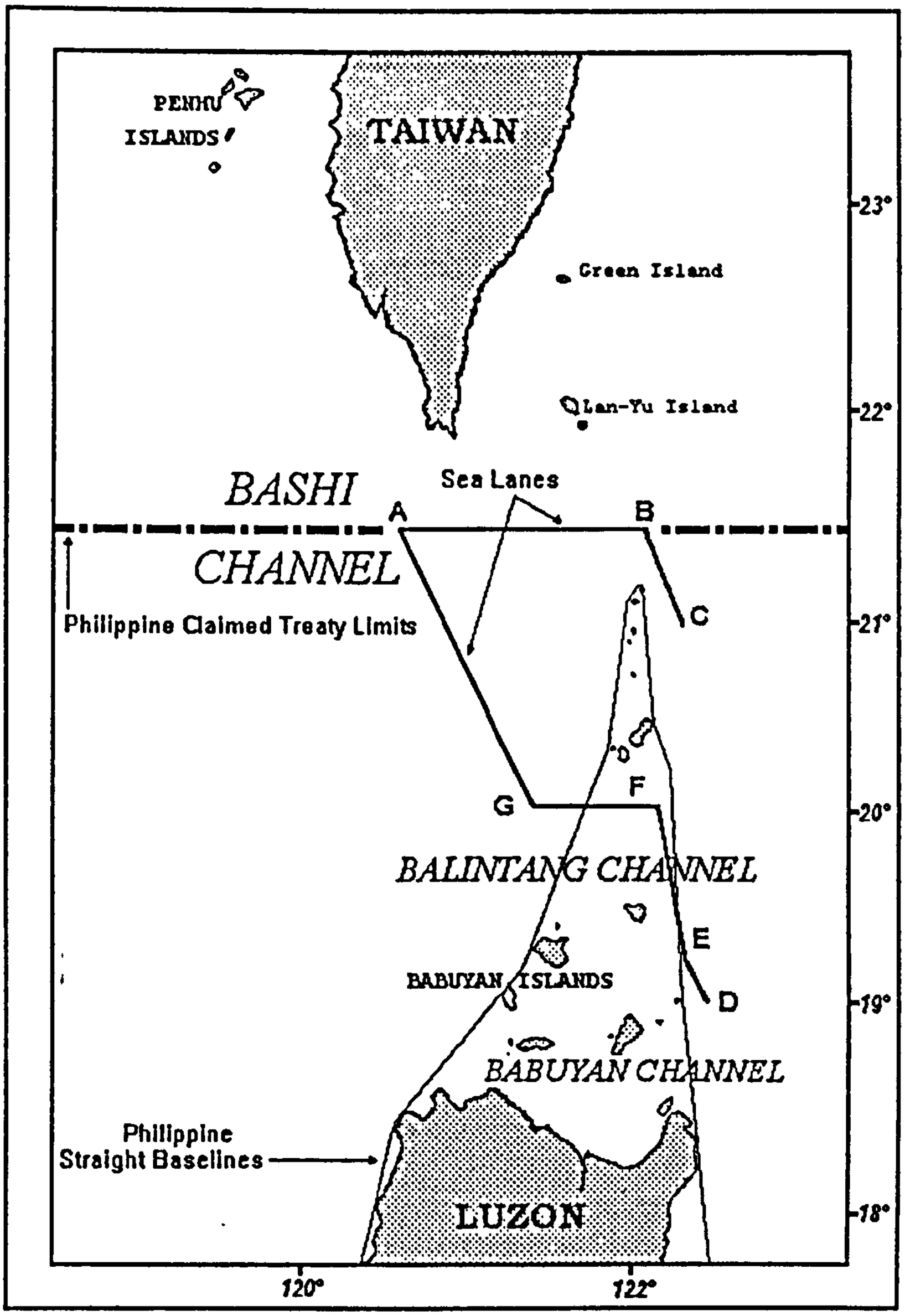
2. The ROC agrees to offer a semi-annual estimate of fishing vessels which use the Sea Lanes and offer the statistics data in the next year.
3. The ROC Council of Agriculture will immediately dispatch a team of agricultural experts to the Philippines to survey areas affected by the Mount Pinatubo eruption and provide technical suggestions and assist the Philippines in reconstructing its agriculture system damaged by the eruption. Both Parties will reach an arrangement about long-term agricultural co-operation.
4. Under the condition of provisions of the Philippine Constitution and law, both Parties seek the arrangement of fishery co-operation in the off-shore areas, which includes:
   (A) encouraging the ROC private entrepreneur's investment;
   (B) conservation, management and utilisation of fishery resources;
   (C) scientific research on fisheries;
   (D) aquaculture on fresh and sea water living organisms in the Philippines;
   (E) processing and marketing of fishery products; and
   (F) such other items that are mutually agreeable to both Parties.
5. The Philippines will allow the ROC fishing vessels, except for driftnet, shellfishes, lobsters, and other species which are restricted by the Philippine government, to operate in the waters which depth is over seven fathoms and to land and sell catches, supply, repair, transport, and employ crews in the Philippine ports.
6. In response to the Philippine *bona fide*, the ROC will offer assistance:
   (A) encourage the entrepreneur to co-operate with the Philippines in fishing industry, crew training, and crew employment.
   (B) donating five used fishing vessels, equipped with necessary facilities, to the Philippines.
   (C) improving the construction of Aparri fishing port in Luzon.
   (D) sending lecturers to Regional Fishermen's Training Centre in the port of Aparri to elevate the Philippine fishery techniques.
   (E) employing the fishermen from Aparri aboard the ROC fishing vessels.
7. Other items:

(A) in case that the ROC fishing vessels are arrested or detained due to alleged violations of the applicable laws of the Philippines in the future, the Philippines agrees that it will release the vessels and crews after the ROC gives bail;
(B) both Parties agree to hold annual consultations on matters concerning implementation of this Agreement;
(C) all the provisions of this Agreement are inter-dependent and this Agreement shall remain in force as a whole;
(D) both Parties agree that this Agreement shall not be deemed as, and shall be without prejudice to, the final delimitation of any maritime boundaries or jurisdictions of both Parties.

8. This Agreement and Memorandum shall enter into force 30 days after the date of signature.

Basically, this Agreement had accomplished the three tasks mentioned in the first round of negotiations in Manila in May. Both Parties obtained what they wanted. The Philippines gained economic support. The ROC gained sea lanes for its fishermen and ensured their safety, and most importantly, it signed an official agreement with another country with which it did not have official diplomatic relations.

Map 13 Two Sea Lanes Agreed by the ROC and the Philippines in Agreement of 1991



However, further analysis shows that the ROC obtained a right, the right of innocent passage, that it is entitled to have by the international law of the sea. Designation of the two sea lanes for the Taiwanese fishermen pass two maritime zones of the Philippines' are as follows: the first one is the territorial sea as defined by its 'Treaty Limits' and the other is the archipelagic waters based on its straight baselines. Therefore, the rights of other states in these two zones are worthy of examination.

According to the provisions of the LOSC, ships of all states enjoy the right of innocent passage through territorial sea[32] and archipelagic waters.[33] There is no clear and exact definition on innocent passage in the LOSC, but just mentions that in the context of certain activities, the passage might not be treated as innocent.[34] In fact, the

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32 LOSC, Article 17.

33 LOSC, Article 52(1).

34 These activities are:
(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of wilful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;

provisions in the Sino-Philippine Agreement are covered by similar provisions in the LOSC, thus making the provisions in the Agreement are nothing but declaration. In other words, the Taiwanese fishing vessels are entitled to enjoy innocent passage even without having to conclude this Agreement as long as they comply with the regulations, such as not engaging in any fishing activities during passage.

Nevertheless, the Agreement is a significant achievement in the context of the relations between Taiwan and the Philippines. It not only provides the Taiwanese fishermen vital passage to the south Pacific fishing grounds, but also offers Taiwan and the Philippines the opportunity to co-operate. It also provides an example of how to solve maritime problems between Taiwan and its neighbours peacefully, which helps to maintain a peaceful and co-operative environment in the area.

2.4. RESPONSE FROM THE PRC

In customary fashion, the PRC opposed the conclusion of this Agreement saying that it was 'resolutely against' the Taiwan authorities holding talks with Manila on territorial waters, adding that any move "to treat Taiwan as an independent political entity" was definitely not acceptable to Beijing.[35]

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

See LOSC, Article 19(2). Also, O'Connell, *The International Law of the Sea,* Vol. I (1982) pp. 272-274.

35 *AP*, Beijing, 8 July 1991.

Beijing formally protested the Agreement, claiming it violated the 'One China Policy' which Manila adhered to when it switched diplomatic recognition from Taipei to Beijing in 1975.[36] The Chinese Foreign Ministry Spokesman Duan Jin said that Beijing opposed any official exchange between Taiwan and countries that had diplomatic ties with China,[37]

> We hope that the Filipino government will, proceeding from the larger interest of safeguarding the China-Philippine friendship, take resolute measures to stop forthwith its activities of an official nature with Taiwan ... Any official agreement signed between a country and Taiwan is illegal and null and void.

At this stage, the Philippine government's attitude is important. On the one hand, the Philippine President Aquino said she would wait for the recommendation of a Cabinet committee before commenting on the Agreement. "In the meantime, suffice it to say that we do not believe that an economic agreement runs counter to the Philippine policy of recognising only one China."[38] Moreover, "it is mere measure designed to forge peace, economic co-operation and friendship with neighbouring peoples."[39] On the other hand, the Philippine Foreign Secretary Raul Manglapus,

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36 In the Joint Communiqué between the Philippines and the PRC of 9 June 1975, the Philippine government agrees to recognise not only the PRC government as "the sole legal government of China," but also stated that it "fully understands and respects the position of the Chinese Government that there is but one China and that Taiwan is an integral part of Chinese territory." Lotilla, "Reflections on the Framework of Manila-Taipei Relations and Current Bilateral Ocean-Use Disputes," 64 *Philippine Law Journal* (1989) pp. 1-2.

37 *AP*, Beijing, 11 July 1991.

38 *AP*, Manila, 12 July 1991.

39 *Straits Times* (6 August 1991) p. 14.

stated that the group of Philippine officials who signed the agreement with Taiwanese officials in Taipei might have exceeded their authority.[40]

After reviewing the Agreement, a presidential study group called by President Aquino, urged Manila to consider the Agreement a mere 'record of discussion' instead of a bilateral pact, because formal recognition of the agreement would have seriously damaged current and long-term relations with Beijing. Moreover, this might have provoked Beijing into abandoning its vow to refrain from supporting local communist guerrillas and into hardening its claim over the Spratly Islands in the South China Sea which are also claimed by Manila.[41] The Philippine presidential study group also revealed such anxiety and warned against outright disavowal of the Agreement since this could trigger a pull-out by Taiwan investors, who had been amongst the most active in recent years.[42] Such a situation demonstrates the dilemma of the Philippine 'One China Policy'. It needs economic support from Taiwan but is afraid of political pressure from China.

Despite this, Taiwan remained optimistic, chiefly because it felt that it was in a stronger position to influence the Philippines since it could prohibit the employment of Philippine workers as well as slow or stop economic aid.[43] An ROC Foreign

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40 *China Times* (13 July 1991) p. 1.

41 *AP*, Manila, 24 July 1991. Cf. Lotilla, *supra* note 36, pp. 29-30.

42 *AP*, Manila, 24 July 1991.

43 *Straits Times* (15 July 1991) p. 12.

Ministry official said that the Philippine government should have already considered the possible reaction from the PRC before it sent a delegation to Taiwan.[44] Chiu, Vice Chairman, Council of Agriculture, said, "Representatives of Taiwan and the Philippines were both solemn when they negotiated the fishery agreement since the agreement benefits two countries."[45] An official of the Council of Agriculture said that what Manila was doing was probably a tactical move in dealing with the PRC.[46]

Surprisingly, on 5 August 1991, the Philippine President issued the Executive Order No. 473,[47] replacing the Agreement signed by the Taiwanese and Philippine delegates. The Executive Order No. 473 stipulates that Taiwan fishing vessels granted the right of innocent passage in designated sea lanes should notify the Philippine naval or coastal authorities in advance.[48] This provoked a strong protest from Taiwan. Not only because this stipulation was not included in the Agreement, but also because it may be considered as tantamount to recognition of the designated sea lanes as lying in Philippine territorial waters which would hamper the ROC's position in future negotiations on maritime delimitation.

The ROC Agriculture Council Chairman Yu, on 19 August, told Manila's Economic and Cultural Office Representative Joaquin Roces that Taiwan would not

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44 *AP*, Manila, 12 July 1991.

45 *China Times* (26 July 1991) p. 1.

46 *United Evening News* (25 July 1991) p. 2.

47 *China Times* (6 August 1991) p. 4.

48 Part II of the Executive Order No. 473, *ibid.*

accept any conditions unilaterally added to the Agreement. He said, "Before Taiwan receives a written response from the Philippines, Taiwan will suspend all fishery and agricultural assistance promised to the Philippines in the Agreement. Taiwan hopes the Philippines will take the Agreement seriously, otherwise other talks and agreements between the two nations will be affected."[49]

On 20 August, J. Roces delivered three letters from the Philippine government to the ROC Agricultural Council Chairman as proof of the Philippines' intent to abide by a fishery agreement signed with Taiwan. The letters claim that Executive Order No. 473, which stipulates that fishing boats passing through sea lanes must first notify the Philippine authorities, does not apply to Taiwan but was a management method applicable to other states' fishing vessels which used these two sea lanes.[50] Thus, the Agreement automatically came into force on 6 August 1991. Up to now, the Agreement has worked well. No further fishery disputes have arisen in the Agreement area.

3. OBSERVATIONS

Due to its international legal status, Taiwan has been unable to conclude agreements with other states. Nonetheless, Taiwan has been accepted as a counterpart during

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49 *China Times* (10 August 1991) p. 1. Also *Gazette of the Legislative Yuan,* Vol. 80, No. 80, 1 October 1991, p. 74.

50 *China Times* (21 August 1991) p. 4.

negotiation or a party that has to be included in an agreement under certain circumstances. In the case of the Wellington Convention for the purpose of prohibiting the use of driftnet, the Convention had to be disguised as an exchange of letters between the Director of the FFA and the Taiwan Deepsea Tuna Boat Owners and Exporters Association, because the FFA knows that the Wellington Convention cannot be successfully implemented without Taiwan's participation. Similarly, the Philippines would like to take Taiwan as its negotiation counterpart because agricultural and fisheries co-operations can generate significant economic benefits.

Therefore, pursuing national interests is a definite consideration in the intercourse between states. Under such circumstances, international law serves as a tool to satisfy a state's national interests. Consequently, Taiwan's inability to conclude agreements with other states is an international political issue. International law has the theoretical capacity but not the practical ability. Under such circumstances, whether Taiwan can be accepted as a party to certain negotiations or agreements depends on whether Taiwan's joining can create benefits or not.

PART IV.

CONCLUSION

As shown earlier, provisional arrangements in fishery co-operation could be an ideal resolution to the maritime conflicts of the South China Sea. To illustrate that hostilities between parties concerned cannot and should not be an obstacle to co-operation, the author highlights the Falkland Islands/Islas Malvinas conflict and resolution in the next section.

There are several similarities between the disputes of island groups in the South China Sea and the Falkland Islands in the southwest Atlantic Ocean. Firstly, sovereignty dispute is the main issue in both regions. As explained in Chapter 4, the littoral states of the South China Sea claim all or part of the islands which cause overlapping areas, especially in the Spratly Islands region. In the southwest Atlantic region, both the UK and Argentina claim sovereignty over the Falkland Islands based on their own respective interpretations of historic evidence and international law. Secondly, economic interests, fishery resources and hydrocarbon resources, are the 'background' that trigger their claiming sovereignty over those islands. This was discussed in Chapter 4, Section 2 for the South China Sea region. We shall have a look at the same interests for the southwest Atlantic in the following discussion.

1. FALKLAND ISLANDS DISPUTES

The Falkland Islands, with a total population of about 1,800, consist of two main islands (East Falkland and West Falkland) together with about 200 other small islands and islets situated about 350 miles North-East of Cape Horn in the South Atlantic.[1] Apart from building stone, the Falklands themselves have no known useful mineral resources. The economy of the Falklands in 1984 depended almost entirely on the high quality wool of its 650,000 sheep.[2]

Both the UK and Argentina claim sovereignty over the Falkland Islands.[3] The debate over ownership of the Falklands is potentially interminable because of contending versions of the history of the islands. As Sir Anthony Parsons remarked,

"[M]y Argentine colleague and I could debate endlessly the rights and wrongs of history, and I doubt whether we would agree."[4]

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1 House of Commons, Fifth Report from the Foreign Affairs Committee, *Falkland Islands*, 268-I (1984) para. 10.

2 *Ibid.*, para. 11. Also, Strange, *The Falkland Islands* (1972).

3 Beck, *The Falklands As An International Problem* (1988) Chapters 2 and 3; Dabat and Lorenzano, *Argentina: The Malvinas and the End of Military Rule* (1984); Destefani, *The Malvinas, the South Georgias and the South Sandwich Islands: The Conflict with Britain* (1982); Gamba, *The Falklands/Malvinas War: A Model for North-South Crisis Prevention* (1987); Gravelle, "The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain," 107 *ML* (1985) pp. 5-69; Rubin, "Historical and Legal Background of the Falklands/Malvinas Dispute," in Coll and Arend, eds., *The Falklands War: Lessons for Strategy, Diplomacy, and International Law* (1985) pp. 9-21.

4 British Government, *Britain and the Falklands Crisis: A Documentary Record* (1982) p. 24. Brackets added.

The Falkland Islands are clearly not prosperous islands, at least from an economic viewpoint. Then, why did both the UK and the Argentina want these islands so badly, and even went to war over them? The answer to this has to do with the potential natural resources existing there and their possible exploitation in the future. The anticipation to exploit intensified when the EEZ had become an international fashion and more foreign fishing vessels came to the waters around the Falklands.

1.1. THE POTENTIALITY OF NATURAL RESOURCES

Two natural resources are important in the area surrounding the Falkland Islands, namely, fishery resources and hydrocarbon resources. The fishery resources in the offshore waters of the Falkland Islands mainly are southern blue whiting, hake (*Merluccius polylepis*), and squid (shortfin squid and common squid). According to an FAO report, in the period of 1984-1985, the average annual catch of these species was 105,000 tonnes for Southern blue whiting, 30,000 tonnes for hake, 178,000 tonnes for shortfin squid, and 50,000 tonnes for common squid. Among them, squid and hake are already commercially important.[5] Owing to its great potential, fishing effort in the

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5 *Falkland Islands Economic Study 1982*, Cmnd. 8653, p. 69; Csirke, *The Patagonian Fishery Resources and the Offshore Fisheries in the South-West Atlantic, FAO Fisheries Technical Paper*, No. 286 (1987). Also see Bisbal, "The Southeast South American Shelf Large Marine Ecosystem," 19 *Mar. Pol.* (1995) pp. 21-38.

Falkland Islands waters had built up rapidly in the early 1980's, as did the total annual catches and total number of countries and fishing vessels.[6]

In terms of the hydrocarbon resources, detailed geophysical surveys are still needed to assess the presence of potentially hydrocarbon-bearing structures. So far, it is believed that the sediments are thinner on the Falklands Plateau to the east of the Islands and that the area between the Falklands and South Georgia is not considered as one of great potential by the oil industry.[7] Nonetheless, preliminary results from seismic surveys conducted in 1993 around the Falklands suggested the possibility of finding oil across a zone 25% larger than the North Sea.[8]

These resources are part of the reasons which caused conflicts between the UK and Argentina. Since Argentina sent troops to the Falkland Islands in April 1982, a great deal of changes took place in UK-Argentina relations since the war. These changes resulted in the establishment of different zones around the Falkland Islands. We shall take a look at these changes which are from hostility to co-operation.

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6 Csirke, *ibid.*, pp. 1-3. Also, working paper prepared by the UN Secretariat on the "Falkland Islands (Malvinas)", UN Doc. A/AC.109/878, 6 August 1986, pp. 16-17, cited from Symmons, "The Maritime Zones Around the Falkland Islands," 37 *ICLQ* (1988) pp. 284-285.

7 Cmnd. 8653, pp. 95-96.

8 *Financial Times* (2 December 1993) p. 1; Owen and Barham, "British Offer Over Falkland Oil," *Financial Times* (26 January 1994) p. 3.

1.2. PHASE ONE: DISPUTE ON SOVEREIGNTY

A. MARITIME EXCLUSION ZONE (MEZ)

After Argentina deployed a military force to take control of the Falkland Islands on 2 April 1982, the UK government, on 7 April 1982, announced the establishment of a Maritime Exclusion Zone (MEZ) on 12 April 1982 around the islands, in the form of a 200 nm circle from the co-ordinates of 51°40' south latitude and 59°30' west longitude.[9]<See Map 14>

The MEZ was directed at Argentine warships and naval auxiliaries. Argentine ships found within the zone would be treated as hostile and were liable to be attacked by British forces.[10] In reply to the Britain declaration, on the same day, Argentina declared a Maritime Defence Zone (MDZ), which covered the same area as the MEZ.[11]

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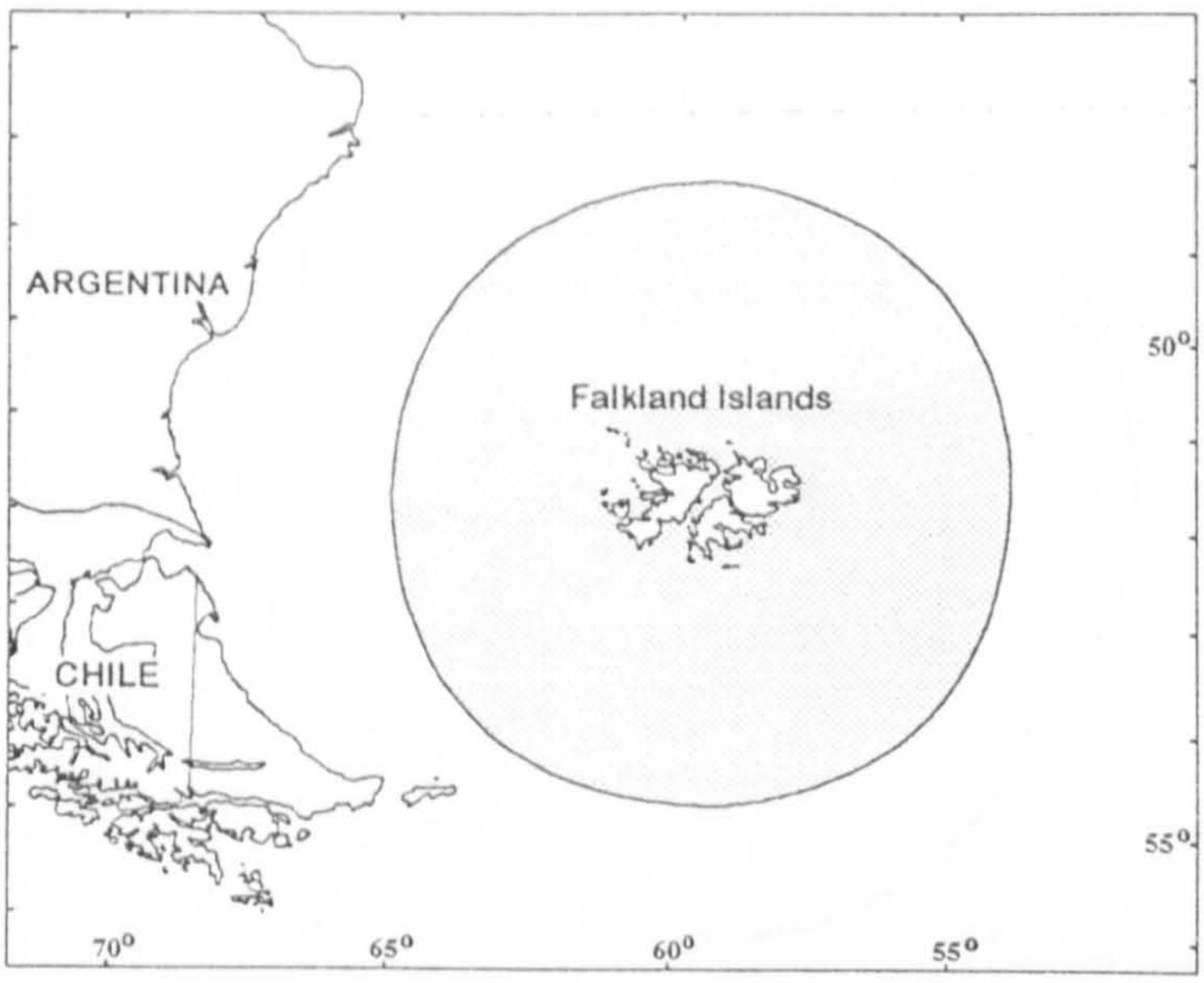
9 UKMIL, 53 *BYIL* (1983) p. 539.

10 *Ibid.*

11 Bisbal, "Fisheries Management on the Patagonian Shelf: A Decade After the 1982 Falklands/Malvinas Conflict," 17 *Mar. Pol.* (1993) p. 215.

Map 14 Maritime Exclusion Zone and Total Exclusion Zone



Source: Churchill, "The Falklands Fishing Zone: Legal Aspects," 12 *Mar. Pol.* (1988) p. 347. Amended by the Author.

B. TOTAL EXCLUSION ZONE (TEZ)

The UK's MEZ was further extended to a Total Exclusion Zone (TEZ) on 30 April 1982.<See Map 14> Although TEZ covered the same area as MEZ, it applied not only to Argentine warships and naval auxiliaries but also to any other ship, whether naval or merchant vessel, operating in support of the occupation forces. The TEZ also applied to any aircraft, military or civil, operating in support of the occupation. Any such ship or any aircraft found in the TEZ without authorisation would be regarded as hostile and liable to be dealt with accordingly.[12]

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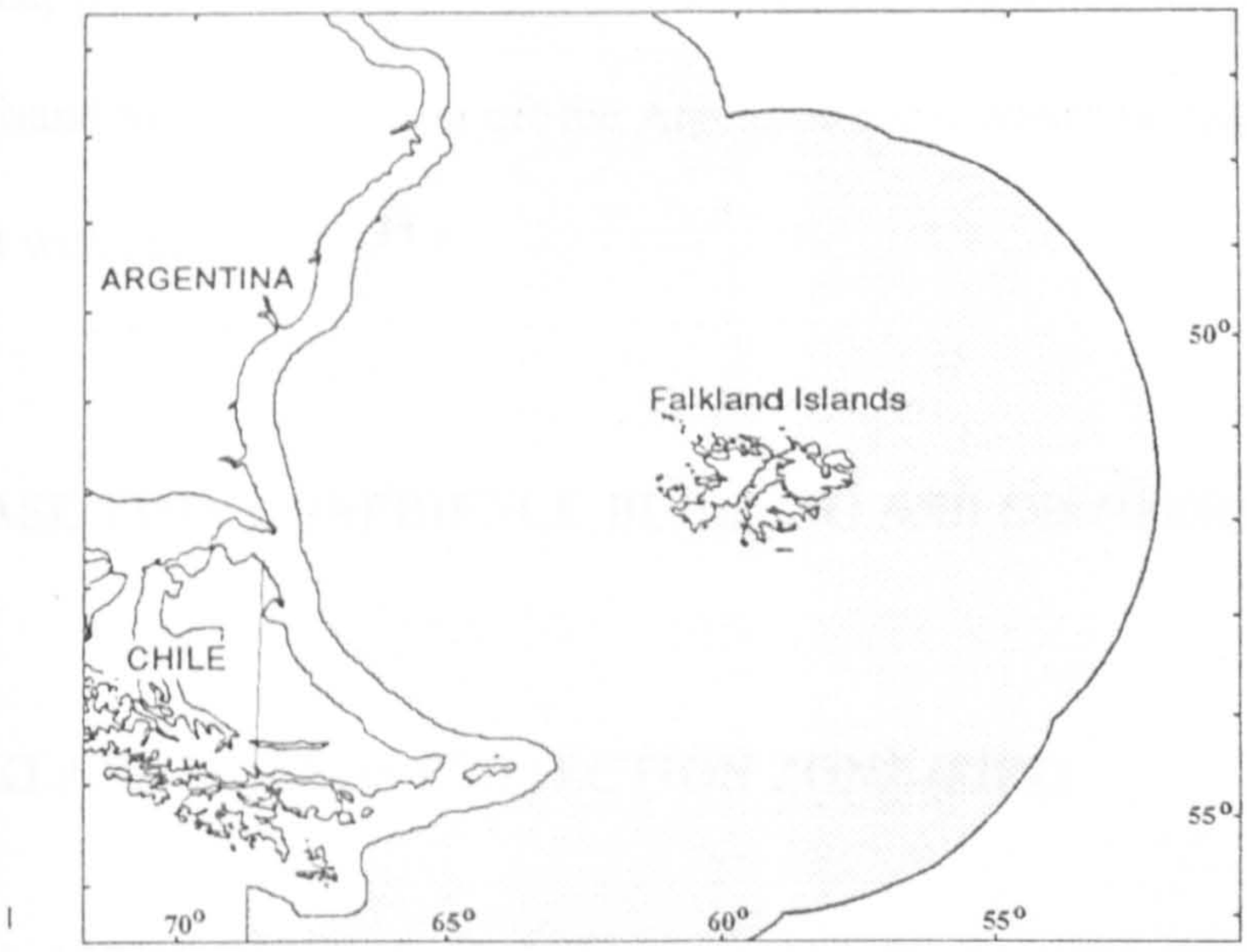
12 UKMIL, 53 *BYIL* (1983) p. 546.

Map 15 Extended Total Exclusion Zone



Source: Churchill, "The Falklands Fishing Zone: Legal Aspects," 12 *Mar. Pol.* (1988) p. 347. Amended by the Author.

On the Argentine side, Argentina announced that all UK naval and air forces within 200 miles of Argentina or the Falklands/Malvinas would be considered hostile and referred to this area as the Exclusionary Zone.[13]

C. EXTENDED TOTAL EXCLUSION ZONE

From 8 May 1982, the UK TEZ was again extended up to 12 nm from the Argentine coast.<See Map 15> According to the UK government, this was necessary because of

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13 Bisbal, *supra* note 11.

the proximity of Argentine bases and the distances that hostile forces could cover undetected, particularly at night and in bad weather. Argentine warships or military aircraft found more than 12 nm off the Argentine coast would be regarded as hostile and dealt with accordingly.[14]

1.3. PHASE TWO: CONFIDENCE-BUILDING AND CO-OPERATION

A. FALKLAND ISLANDS PROTECTION ZONE (FIPZ)

On 23 July 1982, following Argentina's acceptance of a cease-fire, the UK government replaced the extended TEZ with a 150 nm Falkland Islands Protection Zone (FIPZ), from which Argentine warships and military aircraft were excluded. Argentine civil aircraft and shipping were also requested not to enter this zone unless by prior agreement.[15]<See Map 16>

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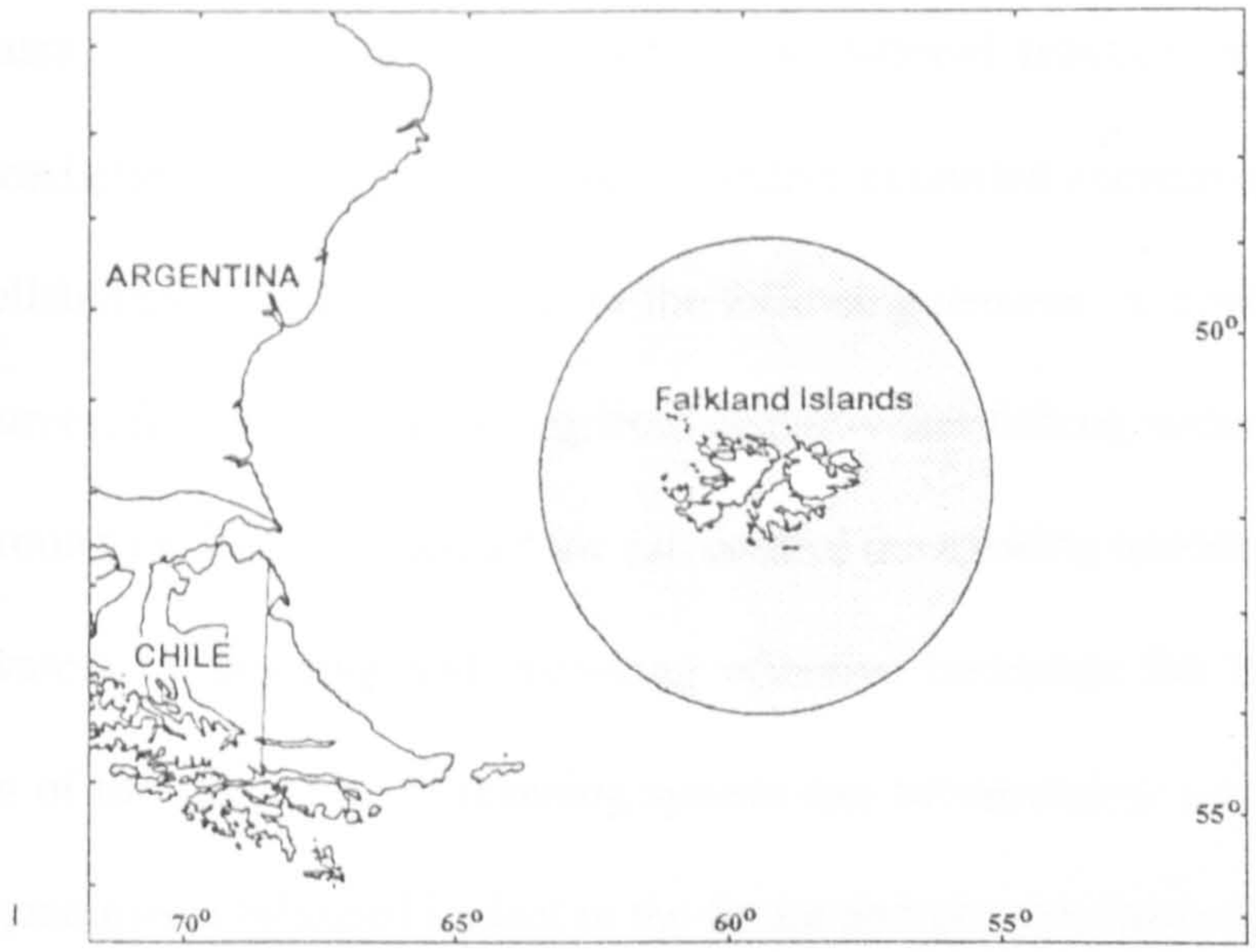
14 UKMIL, 53 *BYIL* (1983) p. 549.

15 *Ibid.*, p. 556.

Map 16 Falkland Islands Protection Zone



Source: Churchill, "The Falklands Fishing Zone: Legal Aspects," 12 *Mar. Pol.* (1988) p. 347. Amended by the Author.

The lifting of the extended TEZ was regarded as the first step to a gradual ending of the conflict and a return to normal relations which would necessitate the removal of the continuing military and economic sanctions and the resumption of diplomatic relations.[16]

B. FALKLAND ISLANDS INTERIM CONSERVATION AND MANAGEMENT ZONE (FICZ)

Although the fishing resources are abundant around the Falklands, the Falkland

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16 Barston and Birnie, "The Falkland Islands/Islas Malvinas Conflict," 7 *Mar. Pol.* (1983) p. 23.

Islanders do not eat a great deal of fish and have little tradition of fishing, even on a part-time basis.[17] Nonetheless, owing to the international practice of establishing extended jurisdiction zones,[18] the Falkland Islanders exhibited enormous enthusiasm for the establishment of a Fishing Zone for the following reasons: A. Due to abundant fishery resources, fishing vessels coming from distant-water fishing states are attracted to operate around the islands. Such a zone can control the existing unlimited fishing in Falklands waters by devising and enforcing effective measures for the long-term conservation of the stocks. B. A licensing system can be created to provide revenue which will guarantee a balanced budget in the future and provide funds for the further development of these Islands.[19]

However, the British government is not convinced that the establishment of an Exclusive Fishing Zone in Falklands waters is justified. It holds that the sovereignty dispute still exists between the UK and Argentina. It is necessary to have some agreements with Argentina in order to operate the zone successfully. Besides, on the sovereignty issue, the establishment of such a zone might provoke instability in the south-western Atlantic region.[20]

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17 Cmnd. 8653, p. 66.

18 See *supra* Chapter Two, Section 3.

19 Cmnd. 8653, p. 72; Fifth Report from the Foreign Affairs Committee, 268-I, *supra* note 1, para. 144.

20 HC Debs., vol. 9, Written Answers, col. 544: 31 July 1981; HL Debs., vol. 426, col. 230: 16 December 1981; Fifth Report from the Foreign Affairs Committee, *Falkland Islands*, 268-I, *ibid.*, paras. 145-147.

Nonetheless, the UK changed its policy on this matter with the increase of foreign fishing vessels in the neighbouring waters and the conclusion of bilateral fishery agreements between Argentina and the USSR and between Argentina and Bulgaria concerning the regulation of fisheries within 200 miles of the Falkland Islands in July 1986.[21] Under these agreements, Soviet and Bulgarian trawlers were granted access rights to Argentine waters, allowed to participate in joint ventures, and allowed to extract surplus resources as determined by Argentine authorities. Argentina, in turn, was to receive 3-5% of the catch revenues, and its nationals were to be offered employment either as on-board inspectors or crew members.[22]

The British government responded to Argentina's fishing negotiations by declaring a 150 nm Falkland Islands Interim Conservation and Management Zone (FICZ) around the Islands on 29 October 1986.[23]<See Map 17> The essential part of the Declaration reads:

> Within these limits [200 nautical miles], legislative measures will be taken shortly in the Falkland Islands to ensure the conservation and management of living resources in accordance with international law. Such measures will be intended to ensure conservation of the stocks on an interim basis pending internationally agreed arrangements for the South West Atlantic fishing as a whole, and taking into account the best scientific evidence. [emphasis added]

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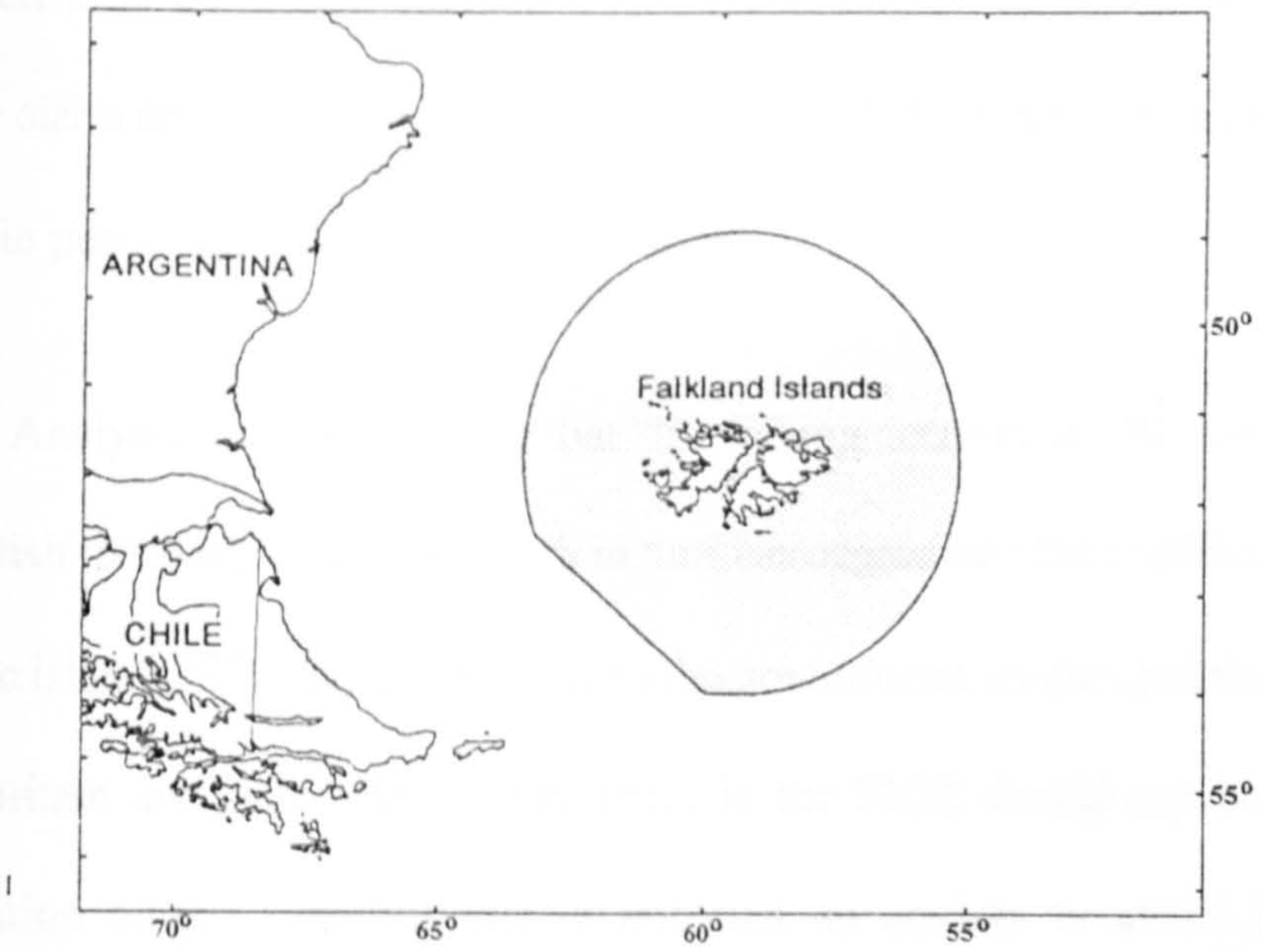
21 HC Debs., vol. 103, col. 326-7: 29 October 1986; Churchill, "The Falklands Fishing Zone: Legal Aspects," 12 *Mar. Pol.* (1988) p. 348; Evans, "The Restoration of Diplomatic Relations between Argentina and the United Kingdom," 40 *ICLQ* (1991) p. 476.

22 Bisbal, *supra* note 11, p. 225.

23 *The Falkland Islands: Recent Declarations and Bilateral Arrangements and Agreements between the United Kingdom and Argentina,* Cm 1824 (1992) p. 5.

Map 17 Falkland Islands Interim Conservation and Management Zone



Source: Churchill, "The Falklands Fishing Zone: Legal Aspects," 12 *Mar. Pol.* (1988) p. 347. Amended by the Author.

Obviously, fishery is the main purpose for establishing an FICZ. In a later explanation, the UK government stated that fishing within the FICZ will be licensed by the Falkland Islands government and the licensing will reflect conservation needs.[24] The reason for confining the FICZ to 150 miles is that the main fishing grounds were included within the FICZ and that it was much more practical and economic to patrol and police a 150-mile zone than a 200-mile zone.[25] Besides, the British government had declared that the Falklands Islands were entitled under international law to fishery

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24 HC Debs., vol. 103, cols. 323-4: 29 October 1986; HL Debs., vol. 500, col. 382: 28 July 1988.

25 UKMIL, 57 *BYIL* (1986) p. 591.

limits of a maximum of 200 nm,[26] it seems safe to presume that the FICZ might be extended from its present breadth of 150 nm to 200 nm in the future.[27] Therefore, a shorter claim and a restrained approach could avoid upsetting Argentinian feelings and maintain peace and stability in the region.[28]

Analysts in Argentina saw that "the fishing accords of 1986 were the cause of the British reaction, a reaction which in turn has aggravated the conflict over the South Atlantic islands."[29] Likewise, the Argentine government challenged the 'illegal' action from Britain and stated that its non-entry in the FICZ should not be interpreted as recognition of the zone but merely reflected an anxiety to avoid any potentially destabilising event.[30]

Since coming into operation, the FICZ has proved successful both in conserving and regulating fish stocks and in diversifying the Falklands economy. During the first year after Britain established the FICZ, a reported fishing catch worth over £500 million and amounting to over 300,000 tons, licence revenues of £13.5 million and transhipment fees of £0.8 million, have created the impression of clear economic progress in 'an exciting new fishing ground' after a long period of decline.

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26 Cm 1824, p. 5.

27 House of Commons Defence Committee, *Defence Commitment in the South Atlantic* (1987) pp. 45-46.

28 Symmons, *supra* note 6, p. 291.

29 Gamba-Stonehouse, *A Strategy in the Southern Oceans: A South American View* (1989) p. 119.

30 *GAOR*, UN Doc. A42/118.

Besides, its role in the transhipment of fish has prompted descriptions of Berkeley Sound as both 'a floating industrial city' of 6,000 people and one of the busiest ports in the southern hemisphere.[31]

C. FALKLAND ISLANDS OUTER FISHERY CONSERVATION ZONE

Following on the increasing revenue from fishing, the issue of Falkland Islands sovereignty disputes is highlighted.[32] Negotiation is inevitable, but the agenda is arguable. Argentina insisted that sovereignty of the islands should be incorporated in the Falkland Islands sovereignty negotiations agenda, but the UK disagreed.[33] The British government hold that it is convinced of its sovereignty over the islands and the sovereignty issue should be frozen for a substantial number of years while both sides reserving their position.[34] Additionally, the British government asserted that it takes account of the Falkland Islanders' right to self-determination. On the other hand, Argentina wanted the transfer of sovereignty irrespective of the wishes of the Falkland Islanders.[35] Their attitude complicated the situation and obscured the objective of the FICZ - exploitation and conservation of fishery resources. Most of the fish stocks on the part of the Patagonian Shelf adjacent to the Falklands almost certainly extend over those parts of the Shelf adjacent to Argentina and are what is known to fisheries

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31 *The Times* (30 July 1987) p. 4; *Financial Times* (31 July 1987) p. 6.

32 Beck, *supra* note 3, p. 188.

33 Foreign and Commonwealth Office, *Background Brief* (March 1990).

34 UKMIL, 51 *BYIL* (1980) p. 443 and 52 *BYIL* (1981) p. 448.

35 Evans, *supra* note 21, pp. 475-476.

scientists and administrators as shared stocks. The implication is that effective conservation and management, to ensure continuing economic benefits, will not be possible without the co-operation of both parties, at least to the extent of exchanging scientific information and statistics relating to the operations of commercial fishing vessels in the area.[36]

After some preparatory diplomatic contacts, the newly elected Argentine President Carlos Menem conciliated his government's position because he knew that all territorial disputes should be peacefully negotiated and, more importantly, that border tensions should be lowered so as to permit the government to concentrate on the issues of social and economic development. Therefore, a series of substantive meetings with Britain were initiated. This could be regarded as the start of the confidence-building period between the two parties. Both parties, at the meeting in October 1989 in Madrid, noted that all hostilities between them had ceased and agreed to re-establish consular relations at the level of Consul General.[37] In addition, the UK and Argentina agreed in principle to an 'umbrella formula', which is[38]

> 2. Both governments agreed that:
>
> (1) Nothing in the conduct or content of the present meeting or of any similar subsequent meetings shall be interpreted as:
>
> (a) A change in the position of the United Kingdom with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas;

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36 Cmnd. 8653, p. 73.

37 Cm 1824, p. 7.

38 *Ibid.*

(b) A change in the position of the Argentine Republic with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas;

(c) Recognition of or support for the position of the United Kingdom or the Argentine Republic with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas.

(2) No act or activity carried out by the United Kingdom, the Argentine Republic or third parties as a consequence and in implementation of anything agreed to in the present meeting or in any similar subsequent meetings shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or the Argentine Republic regarding the sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas.

Under such a formula, the sovereignty issue would for the time being be put aside with each side reserving its position. The parties would then proceed to negotiate settlements on other issues, such as fishery conservation and future co-operation on fisheries, involved in restoration of normal bilateral relations.[39] In other words, both parties arrived at an implied understanding that neither would raise any claim concerning sovereignty or territorial and maritime jurisdiction over the Falkland Islands. At this meeting, Argentina confirmed that hostilities between the two adversaries had ceased. Both governments reaffirmed their commitment under the UN Charter to settle disputes exclusively by peaceful means and to refrain from the threat or use of force. Working groups were also set up on the difficult issues of fisheries and security matters in the South Atlantic.[40]

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39 *Ibid.*; Smith, ed., *Toward Resolution?: The Falklands/Malvinas Dispute* (1991) p. 111.

40 Cm 1824, pp. 7-8.

A meeting in Madrid on 15 February 1990 reflected the spirit of the 'umbrella formula' again. In the joint statement after that meeting,[41] both parties agreed that, first, embassies would be re-opened shortly and ambassadors appointed in accordance with international practice. Secondly, an Interim Reciprocal Information and Consultation System would be established for movements of units of their armed forces in areas of the South West Atlantic. The System's aims are to increase confidence between the UK and Argentina and to contribute to achieving a more normal situation in the region without unnecessary delay. Thirdly, both parties agreed to co-operate on improving the marine safety in the South West Atlantic. In order to achieve this, a mechanism for emergencies aimed at facilitating air and maritime search and rescue operations in the region, as well as a system will be established to exchange information on the safety and control of air and maritime navigation. Fourthly, both parties would exchange available information on the operations of the fishing fleets, appropriate catch and effort statistics and analyses of the status of the stocks of the most significant off-shore species in the maritime area of the Atlantic Ocean between latitude 45° south latitude and 60° south latitude. They also agreed to assess such information jointly, and to explore bilaterally the possibilities for co-operation and conservation.

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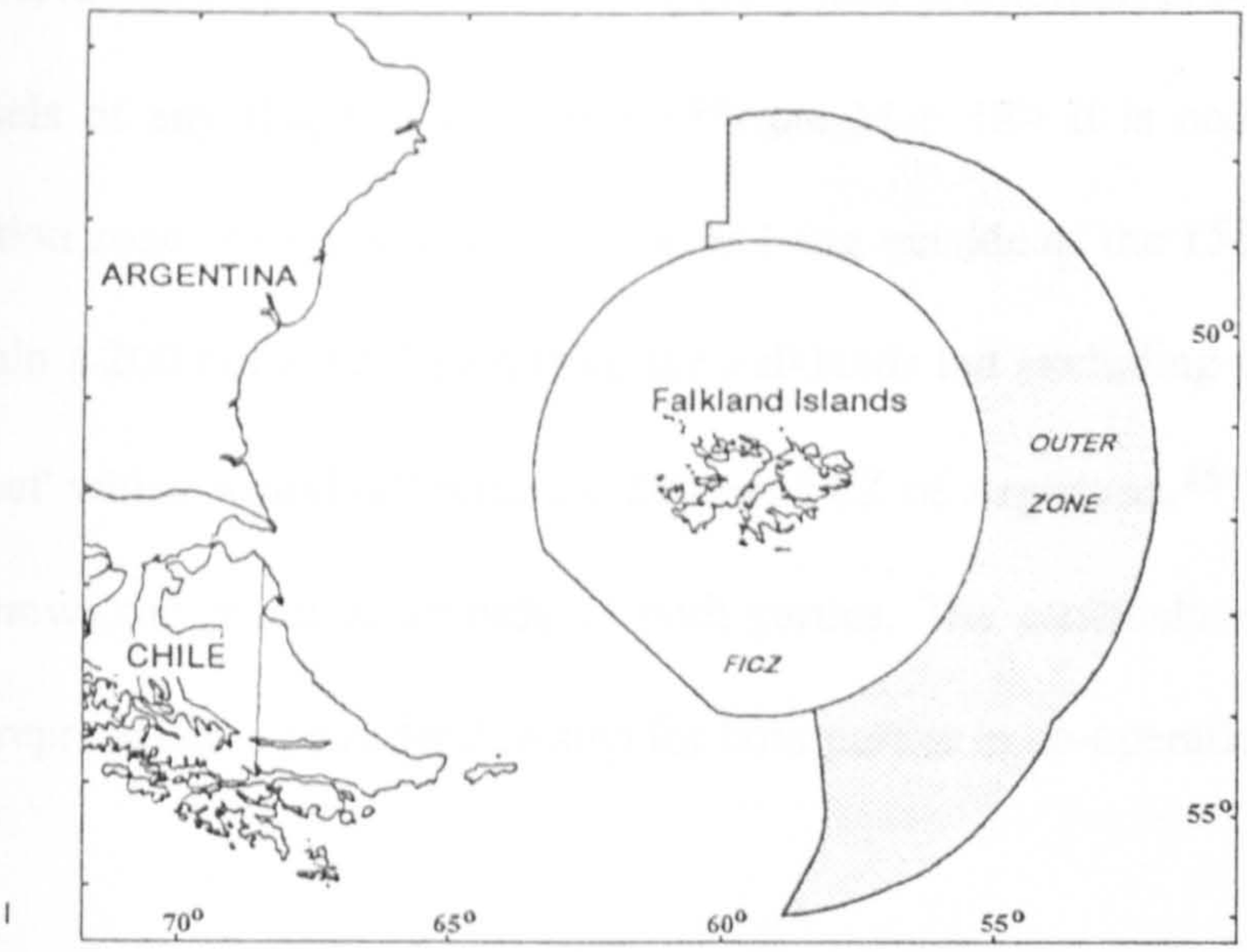
41 *Ibid.*, pp. 10-11.

Map 18 Falkland Islands Outer Fishery Conservation Zone



Source: Churchill, "The Falklands Fishing Zone: Legal Aspects," 12 *Mar. Pol.* (1988) p. 347. Amended by the Author.

In addition, the British and Argentine governments gave greater attention to the conservation of fishery resources. In a joint statement issued on 28 November 1990,[42] they established an Anglo-Argentine fisheries regime, namely the South Atlantic Fisheries Commission to assess the state of fish stocks in the South Atlantic. This Commission was to be composed of a delegation from each of the two states, and would meet at least twice a year for joint control and conservation of the most significant off-shore species in the South Atlantic fishing grounds between 45° south

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42 *Ibid.*, pp. 12-13.

latitude and 60° south latitude.[43] Another agreement reached at this meeting was that, for conservation purposes, a zone of temporary total prohibition of commercial fishing by vessels of any flag was established.[44]<See Map 18> It is noteworthy that this prohibition zone corresponds to those areas lying outside of the 150 nm FICZ which are within a 200 nm zone drawn from the Falklands but excluding those parts of this 'doughnut' which would fall with the 200 nm EEZ of Argentina.[45] This arrangement again shows the practical attitude of both parties. The establishment of a fisheries regime represented a considerable step for both parties in co-operation.

2. FINAL REMARKS

It is now time to conclude what we have analysed and discussed in the preceding chapters. Under the circumstances that EEZ has become a customary international law, all the littoral states of the South China Sea had claimed different maritime zones to extend their jurisdiction over living and non-living resources of these zones. This then is the central element with regard to the disputes in the South China Sea. Three motivating factors behind the conflicts have been examined: the first one relates to strategic or political concerns, whilst the other two relate to resource utilisation or economic considerations. These factors are interrelated, which further complicates the issue. However, the *détente* in regional international relations has helped the littoral

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43 *Ibid.*

44 *Ibid.*, pp. 12, 14. This prohibition came into force on 26 December 1990 by Proclamation No. 2 of 1990. See Cm 1824, pp. 15-16.

45 Evans, *supra* note 21, p. 481.

states to consider the issue from a pragmatic viewpoint. The idea of co-operation has gradually come to play an important role in a semi-enclosed region like the South China Sea. Therefore, unless a state is ready to go to war over its *terra irredenta*, the best solution is the will to arrive at a non-boundary-based settlement that guarantees peace and progress for all parties concerned.[46]

Chapter 5 discussed the possibilities for co-operation and identified the management of fisheries resources as especially significant because fish are migratory, while some of them are highly migratory.[47] Moreover, overfishing is a serious and pressing problem in the region. Under such circumstances, a maritime boundary cannot entirely protect a state's fishery resources from encroachment, because not only can the fishery resources migrate beyond the state's territorial or fishing zones, but also overfishing outside the borders can affect the fish stocks within its territorial boundaries. Therefore, a proper management mechanism, subject to natural conditions, is necessary for the coastal states to keep a certain stock at a sustainable level.[48] This is especially important for the littoral states around the South China Sea. Because it is a semi-enclosed sea, any change in the fishery policy-making could have far-reaching effects on the fishery resources in this area. Therefore, a rational future

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[46] Charney, "Central East Asian Maritime Boundaries and the Law of the Sea," 89 *AJIL* (1995) p. 746; Villacorta, "The Philippine Territorial Claim in the South China Sea," Paper presented in International Academic Conference on Territorial Claims in the South China Sea, December 4-6 1990, pp. 11-12.

[47] *Supra* Chapter 2, Sub-Section 5.2.

[48] Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: The United Nations Law of the Sea Convention Cooperation between States* (1989) p. 15.

co-operation is above all dependent on all the littoral states adopting co-operative measures to conserve their fishery resources.

This is reflected in the discussion of the Falkland Islands disputes. According to the UK and Argentina's experience on the disputes over the Falkland Islands, claiming sovereignty played an important role in the outbreak of war in 1982. Nonetheless, the post-war development encourages both parties to concentrate on co-operating in the conservation and management of living resources, although they still maintain their own claims to the islands.

If we turn our focus back to the South China Sea, we would find that many opportunities for co-operation exist, such as military co-operation, joint development on hydrocarbon resources, and fishery co-operation. Nevertheless, disputes surrounding possible hydrocarbon resources in the area and mistrust among relevant parties, actions in favour of conservation and management of fishery resources has been delayed. Paradoxically, conservation and management of fishery resources could be the starting point for co-operation in this field and could have a 'spill-over effect' on other areas of co-operation.

Another consideration which should be born in mind is all the relevant states should be included in the co-operation mechanism no matter how deep the political concerns are among them. Hence, Taiwan, as one of the littoral states of the South China Sea, cannot be ignored because of its international status. This is not only because Taiwan occupies the biggest island in the Spratly Islands, but also because it is

one of the most important distant-water fishing states in the world and in the region. Due to the civil war between the two Chinese governments, Taiwan is not recognised by most countries of the world. Thus, a paradoxical situation arise in the international arena. On the one hand, because of the political recognition issue, Taiwan can not be invited as a participant in negotiations. On the other hand, Taiwanese fishing capabilities are too important to be ignored. Therefore, many dubious ways have been devised to solve this problem temporarily just to avoid the sensitive issue of international recognition.

Accordingly, under the circumstances that all littoral states of the South China Sea take note of the importance of the conservation and management of the fishery resources in the region, the next step depends on their will and determination to pursue co-operation on this matter. Furthermore, every party concerned should be included in the co-operation regime so that the system can work effectively. In view of Taiwan's capabilities, it should not be left out of the co-operation mechanism or arrangements so that a near-perfect co-operation mechanism can be reached and the disputes in the South China Sea can be solved.

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IX. Selected Interviews and Communications

An interview with a staff in Fishery Bureau, Department of Agriculture and Forestry, Taiwan Provincial Government on 22 August 1991.

An interview with a staff at the Overseas Fisheries Development Council of the Republic of China on 16 December 1993.

An interview with an official of Marine Fisheries Division, Department of Fisheries, Council of Agriculture, Executive Yuan, ROC, 18 January 1994.

A letter from Ms Mary Brandt, Office of the Assistant Legal Advisor for Treaty Affairs, dated 3 May 1995. Answering my question about the present status of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, 16 June 1994.

An interview with a staff at the Overseas Fisheries Development Council of the Republic of China on 15 February 1996.